
IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. **77-1427**

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,
Petitioners,

—v.—

CARL BEAZER, *et al.*,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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FOR THE SECOND CIRCUIT**

The petitioners respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals, Second Circuit, dated and entered in this case June 22, 1977 and February 1, 1978.

* Petitioners, who were defendants in the District Court, appellants-cross-appellees in the appeal to the Circuit Court are the New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority, William J. Ronan, individually and in his capacity as a member and as chairman and chief executive officer of the New York City Transit Authority and also as a director and as chairman and chief executive officer of the Manhattan and Bronx Surface Transit Operating Authority, and his successors in office, William L. Butcher, Lawrence R. Bailey, Harold L. Fisher, William A. Shea, Eben W. Pyne, Leonard Braun, "Justine" N. Feldman, Donald H. Elliott, Frederic B. Powers and Mortimer Gleeson, individually and in their capacities as members of the New York City Transit Authority and directors of the Manhattan and Bronx Surface Transit Operating Authority, and their successors in office; Wilbur B. McLaren, individually and in his capacity as executive officer for labor

Opinions Below

The opinion of the United States Court of Appeals, Second Circuit, of June 22, 1977 is reported at 558 F.2d 97 (1977), and reprinted as Appendix A annexed hereto (*infra*, p. 1a). The opinion of the United States Court of Appeals, Second Circuit, entered on February 1, 1978, denying petitioners' petition for rehearing is unreported and appears as Appendix B (*infra*, p. 9a). The opinion of the United States District Court for the Southern District of New York dated August 6, 1975, is reported at 399 F. Supp. 1032 and reprinted as Appendix C (*infra*, p. 11a). The Supplemental Opinion of the United States District Court for the Southern District of New York dated May 5, 1975, is reported at 414 F. Supp. 277 and reprinted as Appendix D (*infra*, p. 70a).

relations and personnel of the New York City Transit Authority, and his successors in office; Louis Lanzetta, individually and in his capacity as medical director of the New York City Transit Authority, and his successors in office. The Civil Service Commission of New York; Personnel Department of the City of New York; Harry I. Bronstein, individually and in his capacity as a member and as Chairman of the Civil Service Commission of the City of New York, and director of the Personnel Department of the City of New York, and his successors in office; David Stadtmauer and James W. Smith, individually and in their capacities as members of the Civil Service Commission of New York, and their successors in office, were dismissed from the action after the District Court judgment.

** Respondents, who were plaintiffs in the District Court, respondents-cross-appellants in the appeal to the Circuit Court are Carl Beazer; Jose R. Reyes; Francisco Diaz; Malcolm K. Frasier, individually and on behalf of all others similarly situated. Nathaniel Wright was added as a named plaintiff-appellee-cross-appellant member of the class after the District Court trial had begun.

Jurisdiction

The judgment of the United States Court of Appeals, Second Circuit was entered on June 22, 1977, Appendix A (*infra*, p. 1a). A motion and petition for a rehearing en banc was denied by the United States Court of Appeals, Second Circuit on February 1, 1978 Appendix B (*infra*, p. 9a). An order granting petitioners' motion for stay of mandate was entered on March 10, 1978. This petition for certiorari was filed within 90 days of the order denying rehearing and within 30 days of the order granting stay of mandate Appendix K (p. 102a, *infra*). The jurisdiction of this Court rests on 28 USC § 1254(1).

Questions Presented

1. Are a public transit authority and/or its officials "persons" subject to suit under the Civil Rights Act of 1871 (42 USC § 1983)?
2. If petitioners are subject to suit under the Civil Rights Act of 1871, are they liable for awards of back pay and attorneys' fees?
3. Is the petitioners' denial of employment to former heroin addicts participating in methadone maintenance programs, an unconstitutional denial of due process and equal protection under the Fourteenth Amendment?
4. Is the petitioners' denial of employment to former heroin addicts participating in methadone maintenance programs, an unlawful racial discrimination under Title VII of the Civil Rights Act of 1964, 42 USC § 2000e et seq.?

Constitutional and Statutory Provisions Involved

The Fourteenth Amendment, Section 1 of the Constitution of the United States; Title VII of the Civil Rights Act of 1964, 42 USC § 2000e et seq.; the Civil Rights Act of 1871, 42 U.S.C. § 1983; New York State Public Authorities Law §§ 1200, et seq.; Civil Rights Attorneys' Fees Awards Act of 1976, 28 U.S.C. § 1988; 28 U.S.C. § 1254(1), are set out in Appendices F through J.

Statement

This class action was commenced under 28 USC § 1331, 42 USC § 1983 and 42 USC § 2000e.

The gravamen of the suit was the alleged unconstitutionality of the petitioners' policy of excluding from employment former heroin addicts who are participants in or have completed a methadone maintenance program. The class is composed of all such persons who have been, or would in the future be, subject to dismissal or rejection for employment by the petitioners.

The district court found, under 42 USC § 1983, that the petitioners' exclusion of present and past methadone maintained persons from employment in any position in the New York City Transit Authority was a violation of the due process and equal protection clauses of the Fourteenth Amendment. The court, *inter alia*, ordered the petitioners to give individual consideration to each methadone maintained employee or applicant for employment, and awarded back pay. The district court dismissed the petition as to defendant New York City Civil Service Commission, New

York City Personnel Department, and their named officials.

On May 5, 1976, the district court issued a supplemental opinion finding the petitioners guilty of discrimination under Title VII of the Civil Rights Act of 1964, 42 USC § 2000e, et seq. as amended, for the sole purpose of establishing jurisdiction to award attorneys' fees. On January 24, 1977, following the enactment of the Civil Rights Attorneys' Fees Act of 1976, 42 USC § 1988, the district court issued an Amended Permanent Injunction and Judgment (Appendix E, p. 75a, *infra*) basing its award of attorneys' fees on that Act. The attorneys' fees awarded by the district court were in the sum of \$375,000.00 for legal services performed up to October 8, 1976.

The United States Court of Appeals, Second Circuit, affirmed the opinion of the court below, except it reversed the dismissal as to Beazer, Reyes and Wright, remanded the case to the district court for determination of positions to which Beazer, Reyes and Wright should be reinstated and the amount of back pay due them, and reduced the attorneys' fee award by the sum of \$50,710.00, the amount given by the district court as a "premium" for legal work performed.

REASONS FOR GRANTING WRIT

I.

This case involves issues similar to issues now pending before this Court in another case.

In *Monell v. Dept. of Soc. Serv. of the City of New York*, 532 F.2d 259 (1976), cert. granted 429 U.S. 1071 (1977), this Court granted certiorari on the question of whether local government officials and/or local independent school boards are "persons" subject to suit under 42 USC § 1983, where relief in the nature of back pay was sought against them in their official capacities.

The instant case thus shares with *Monell* the issues of whether a public agency or its officials are "persons" subject to suit for monetary relief under 42 USC § 1983.

II.

The court below has decided substantial and important federal questions in a way which is not in accord with applicable decisions of this Court.

A. The decision below asserts jurisdiction over an independent public transit authority and its officials under 42 USC § 1983, and therefore conflicts with this Court's decisions in *Monroe v. Pape*, 365 U.S. 167 and *City of Kenosha v. Bruno*, 412 U.S. 507.

In *Monroe v. Pape*, 365 U.S. 167 (1961), and *City of Kenosha v. Bruno*, 412 U.S. 507 (1973), this Court ruled that a municipality is not a "person" subject to suit under 42 USC § 1983 (the Civil Rights Act of 1871) for either monetary or equitable relief. The courts of the various

circuits have applied this principle repeatedly to the states and other governmental bodies as well as to municipalities. *Kostka v. Hogg*, 560 F.2d 37 (1st Cir. 1977); *Bennett v. California*, 406 F.2d 36 (9th Cir. 1969); *Guardian Association of New York v. Civil Service Commission*, 431 F. Supp. 526 (SDNY 1977).

The petitioner Transit Authority was created by the legislature as a public benefit corporation to perform the governmental function of operating the transit facilities owned by the City of New York. These functions previously were vested in the Board of Transportation of the City of New York, a former city agency. The Transit Authority is composed of members appointed by the Governor by and with the advice and consent of the Senate. (Public Authorities Law, §§ 1201.1, 1202.1, 1202.2; *Lerner v. Casey*, 2 NY 2d 355 (1957), aff'd 357 US 468 (1958)). The Authority has been held not to be a "person" subject to suit under § 1983. (*Sams v. New York State Board of Parole, et al.*, 352 F. Supp. 296 (SDNY 1972), appeal dismissed 2nd Cir. 12/11/73).

In the course of its opinion in *Monell, supra* (532 F.2d at 263), the Second Circuit observed that the New York City Transit Authority is not a person within the meaning of § 1983. Yet in the present case, the same Second Circuit asserted jurisdiction over the Transit Authority under that same statute.

Other agencies similar to the Authority also have been found not to be persons under § 1983, see *Jagnandan v. Giles*, 538 F.2d 1166 (5th Cir. 1976), cert. den. 432 U.S. 910 (1977); *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977); *International Society for Krishna Consciousness, Inc. v. N.Y. Port Authority*, 425 F. Supp. 681 (SDNY 1977).

The doctrine that municipalities are immune from suit for both equitable and monetary relief under 42 USC § 1983 (*Monroe v. Pape, supra*; *City of Kenosha v. Bruno, supra*), should be equally applicable to public officials. To rule otherwise would effectively remove the immunity provided municipalities by Congress under 42 USC § 1983.

Under New York law, the individually named petitioners herein are duly appointed public officials of an agency of the State of New York (Public Authorities Law, § 1201.2) and the entire thrust of this proceeding is obviously directed to that agency. When such public officials are sued in their official capacities, with the result that liability in equity or damages will be imposed on the State, a subdivision of the State, or a municipality, the suit is, in actuality "one against the State or municipality even though the State or municipality is not named as a defendant" (*Westberry v. Fisher*, 309 F. Supp. 12, 18 [D.C. Me. 1970]). Cf. *Kennecott Copper Corp. v. State Tax Commission*, 327 U.S. 573 (1946); *Ford Motor Co. v. Dept. of Treasury of Ind.*, 323 U.S. 459 (1945); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944).

At most, public officials, in their official capacity, have been held subject only to injunctive or declaratory relief under § 1983. Thus, in *Bennett v. Gravelle*, 323 F. Supp. 203 (D.C. Md. 1971), aff'd 451 F.2d 1011 (1971), cert. dismissed 407 U.S. 917 (1972), in dismissing a complaint for alleged discrimination brought against the Chairman and Members of the Washington Sanitary Commission, the court said:

In their official capacities, the Commissioners are extensions of the municipal agency and are, therefore,

not 'persons' within the meaning of § 1983. Accordingly, damages may not be assessed against the defendants under this section for acting in their official capacities. 323 F. Supp. at 211.

See also *Worley v. California Department of Correction*, 432 F.2d 769 (9th Cir. 1970) and *Silver v. Dickson*, 403 F.2d 642 (4th Cir. 1968), cert. den. 394 U.S. 990 (1969).

This Court recently clarified the scope of immunity of government officials from liability for damages under § 1983. In *Wood v. Strickland*, 420 U.S. 308 (1975), an action for damages under § 1983 against school board officials, the Court declared (at p. 318) that "common-law tradition recognized in our prior decisions, and strong public policy reasons" required the extension of a qualified good faith immunity to the school officials. The Court stated further (at p. 322):

A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.

See also *Scheuer v. Rhodes*, 416 U.S. 232 (1974), in which the Court took note of:

. . . (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligation of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good. 416 U.S. at 239.

In the case at bar, no finding of bad faith was made by the courts below, and consequently, no award of monetary damages could properly be made. As will be demonstrated *infra*, awards of back pay and attorneys' fees must be regarded as monetary damages.

III.

Important and substantial federal questions herein have not heretofore been specifically determined by this Court.

A. Back pay and attorneys' fees are monetary costs which are indistinguishable from damages, and therefore should not be assessed against public officials under 42 USC § 1983.

The courts below awarded back pay to members of the affected class, and attorneys' fees in the sum of \$324,290 for legal services performed up to October 8, 1976.

In *Monell v. Department of Social Services of the City of New York*, 532 F.2d 259 (2d Cir. 1976), cert. granted 429 U.S. 1071, the Second Circuit looked to the legislative history of 42 USC § 1983, recited by Mr. Justice Douglas in *City of Kenosha v. Bruno*, *supra*, 412 U.S. at 516, 517-520 and found that:

... if we try to adjust the grievances of the present plaintiffs by allowing the remedy of back pay under § 1983 ... we would be broadening the indirect remedy of damages generally against cities, which we are reluctant to do for reasons of precedent and concomitant policy.

. . .

The claim for back pay is not merely an adjunct of equitable relief. It stands singly as a claim for damages which cannot be distinguished from many other claims for violations of civil rights in actions which do not involve employment discrimination. 532 F.2d at 267.

Similar findings were made in *Muzquiz v. City of San Antonio*, 528 F.2d 499 (5th Cir. 1976); *Patton v. Conrad Area School District*, 388 F. Supp. 410 (D. Delaware, 1975).

As this Court observed in *Wood v. Strickland*, 420 U.S. 308, 319-320 (1974):

The imposition of *monetary costs* for mistakes which were not unreasonable in light of all the circumstances would undoubtedly deter even the most conscientious school decision-maker from exercising his judgment independently, forcefully and in a manner best serving the long term interests of the school and students. (emphasis added)

Both attorneys fees and back pay awarded herein are "monetary costs," the liability for which would effectively impede the administrative decision-making processes of the petitioners. The financial burden which these monetary costs would impose on the petitioners and on the City and State treasuries which subsidize the petitioners, would be the same whether the award were labeled "damages" or "equitable."

This Court's concern with reality rather than with labels was demonstrated in *Edelman v. Jordan*, 415 U.S. 651 (1973), where it was found, as cited by the Court of Appeals in *Owen v. City of Independence, Missouri*, 560 F.2d 925, 932 (8th Cir. 1977),

. . . that a request for retroactive welfare benefits, even if entitled 'equitable restitution' and made part of an equitable decree in a suit against a state official, is in reality a suit against the state barred by the eleventh amendment if the retroactive benefits are to be paid from the state treasury.

While no Eleventh Amendment claim is made in the case at bar, a similar immunity is provided to public agencies under 42 USC § 1983. The Congress, in its enactment of the Civil Rights Act of 1871 (subsequently 42 USC § 1983), clearly intended to prevent the depletion of public treasuries through the imposition of damage liability upon municipalities or their officials. (See discussion *Monroe v. Pape*, *supra*, pp. 187-192 and *City of Kenosha v. Bruno*, *supra*, pp. 516-520.) If, by labeling attorneys fees and back pay as "equitable" or "costs," they thereby are not deemed as great a threat to public treasuries as are damage awards, a semantic nicety will have overridden the clear intent of Congress.

The Civil Rights Attorneys' Fees Awards Act of 1976, 42 USC § 1988, should not be construed to overcome the immunity provided to public agencies and their officials under § 1983. While Congress, by express language, could have subjected public agencies to awards of attorneys fees in actions brought under § 1983, the Attorneys' Fees Awards Act contains no such express language. In the absence of explicit statutory language subjecting public agencies and officials to liability for attorneys fees, the courts should be reluctant to find an implied waiver of the immunity provided such officials and agencies under § 1983. Cf. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976);

Skehan v. Board of Trustees of Bloomsburg State College, 436 F. Supp. 657 (M.D. Pa. 1977).

B. The court below improperly applied the strict scrutiny standard in finding a denial of due process and equal protection, since this case involves neither a suspect classification nor a fundamental right.

The courts below found that the petitioners' denial of employment to former heroin addicts participating in methadone maintenance programs was an unconstitutional denial of due process and equal protection under the Fourteenth Amendment. In reaching this conclusion, both the district court and the Circuit Court expressly relied on cases (principally, *Sugarman v. Dougall*, 413 U.S. 634 [1973]), which had applied the strict scrutiny standard reserved for cases involving a suspect classification or a fundamental interest. (See Circuit Court decision, 558 F. 2d at p. 99, and district court decision 399 F. Supp. at p. 1057.)

The group involved in the instant case, drug users, is not within the suspect categories which have been enumerated by this Court (e.g., race [*Korematsu v. United States*, 323 U.S. 213 (1944)]; alienage [*Graham v. Richardson*, 403 U.S. 365 (1971)]; and to a limited extent, sex [*Frontiero v. Richardson*, 411 U.S. 677 (1973)]).

Similarly, the employment sought in this case is not a "fundamental right," deprivation of which could be justified only by a compelling state interest. This Court has found that there is no "right" to a job or to appointment to a job. See *Board of Regents v. Roth*, 408 U.S. 564 (1972).

If the decision below is allowed to stand, a new category subject to the Court's strict scrutiny, will have been created.

Since the case at bar involves neither a suspect classification nor a fundamental right, the traditional or "restrained" standard of review should have been applied under the guidelines of *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61 (1911), as follows:

1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. 220 U.S. at pp. 78-79. (emphasis added.)

The petitioners' policy of denying employment to drug users was based on its concern for the safety of the riding public. Petitioners sought to employ persons able to function well in the routine and challenge of daily work, whether in operational or administrative positions. The

record below includes the testimony of medical experts challenging the efficacy of methadone maintenance programs, and in fact, the district court decision acknowledged that "there are differences of opinion as to the merits of methadone maintenance as a treatment for heroin addiction." *Beazer, supra*, 399 F. Supp. at p. 1058.

Clearly, then, this case does not involve the "invidious discrimination" which is necessary to a finding of unconstitutionality under the traditional standard of scrutiny. (See *Dandridge v. Williams*, 397 U.S. 471, 483 [1970].)

C. The district court improperly applied the disparate impact test in finding that petitioners' employment policy violated Title VII of the Civil Rights Act of 1964 (42 USC 2000e).

The Court of Appeals did not reach the question of Title VII jurisdiction and liability as applied to petitioners by the district court. Nevertheless, the district court opinion established an undesirable precedent which merits review by this Court.

The district court ruled that the petitioners' policy of excluding methadone maintained persons from employment had a disparate impact on Blacks and Hispanics and therefore constituted unlawful employment discrimination in violation of Title VII. The ruling was made for the express purpose of establishing jurisdiction for an award of attorneys fees. *Beazer, supra*, 414 F. Supp. at 278. The court found disparate impact solely on the basis of statistics purporting to show (1) that of the employees referred to petitioners' medical consultant "for suspected violation of its drug policy" (*Beazer, supra*, 414 F. Supp. at p. 278) 81% were Black and Hispanic and 19% were White; and (2) that between 62% and 65% of methadone

maintained persons in New York City are Black and Hispanic.

The first set of statistics is irrelevant in the context of this case, since it is not limited to methadone maintained persons nor does it indicate how many, if any, of the persons referred to the medical consultant, were discharged from employment.

The second set of statistics was not presented at the trial as hard data but merely as imprecise estimates by several of the respondents' witnesses. Moreover, the court disregarded the minimal nature of the impact on the relevant group, a threshold requirement for a finding of Title VII discrimination. *Chance v. Board of Examiners*, 458 F.2d 1167, 1176 (1972) reversed on rehearing on other grounds, 534 F.2d 993 (1976) cert. den. 431 U.S. 965 (1977).

The court also disregarded the fact that 46% of petitioners' work force is Black and Hispanic. As stated in *United States v. Ironworkers*, 443 F.2d 544, 551, cert. denied 404 U.S. 984 (1971) the use of statistics must be "conditioned by the existence of proper supportive facts and the absence of variables which would undermine the reasonableness of the inference of discrimination." See also *Causey v. Ford Motor Co.*, 516 F.2d 416, 420. In the case at bar, there are no such supportive facts, the statistics themselves are of dubious validity, and the finding of discrimination is entirely unwarranted.

Moreover, recent decisions have cast doubt on the validity of the disparate impact standard in its application to a public agency. As cited by *Blake v. City of Los Angeles*, 435 F. Supp. 55 (D.C.D. Cal. 1977), the court in

Scott v. City of Anniston, 430 F. Supp. 508 (N.D. Ala. 1977) found,

... the intent standard, i.e. that there must be proof of discriminatory racial purpose as in *Washington v. Davis*, should be applied in civil rights litigation brought under Title VII. ... The Supreme Court held in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666 (427 U.S. at 453, 96 S. Ct. at 2670), that the authority for the 1972 amendment extending Title VII to State and local governments was the Fourteenth Amendment. ... Therefore, it is simple logic that a statute can be no broader than its Constitutional base. ... It follows that in Title VII cases against a State or local government the statute is to be construed in accordance with the Constitutional test adopted by the Court in *Washington, supra*: i.e. there must be proof of discriminatory purpose. (*Scott v. City of Anniston*, 430 F. Supp. at 514-15; cited in *Blake v. City of Los Angeles*, 435 F. Supp. at 63-64.)

In the instant case the court below acknowledged that no discriminatory purpose was present. *Beazer, supra*, 414 F. Supp. 277, 279. Consequently, no support exists in this case for liability under Title VII.

III.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: April, 1978

Appendices

APPENDIX A

Opinion and Judgment of the United States Court of
Appeals, Second Circuit, Entered June 22, 1977

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

CARL A. BEAZER *et al.*,

Plaintiffs-Appellees-Cross-Appellants,

—v.—

NEW YORK CITY TRANSIT AUTHORITY *et al.*,

Defendants-Appellants-Cross-Appellees.

Nos. 1043, 1309, Dockets 76-7295, 77-7092

Argued May 5, 1977

Decided June 22, 1977

Alphonse E. D'Ambrose, Brooklyn, N. Y. (E. W. Summers, G. T. Dunn, Brooklyn, N. Y., of counsel), for defendants-appellants-cross-appellees.

Elizabeth B. DuBois, Eric D. Balber, Mark C. Morril, New York City (Michael Meltsner, New York City, of counsel), for plaintiffs-appellees-cross-appellants.

Robert B. Fiske, Jr., U. S. Atty., S. D. N. Y., New York City, Barbara Allen Babcock, Asst. Atty. Gen., Ronald R. Glancz, Robert S. Greenspan, Walter W. Barnett, Attys., Dept. of Justice, Washington, D. C., Sidney Edelman, Asst.

Gen. Counsel, Rockville, Md., Robert B. Lanman, Senior Atty., Dept. of Health, Education and Welfare, Washington, D. C., on brief for United States as amicus curiae urging affirmance of the appeal.

Before MANSFIELD and OAKES, Circuit Judges, and
BRIEANT, District Judge.*

OAKES, Circuit Judge.

I.

In a comprehensive and carefully limited opinion, the United States District Court for the Southern District of New York, Thomas P. Griesa, Judge, held that the New York City Transit Authority's blanket exclusion from employment of all persons participating in or having successfully concluded methadone maintenance programs—the plaintiff class in this action brought under 42 U.S.C. § 1983—violated the equal protection and due process clauses of the Fourteenth Amendment. The court enjoined the Transit Authority (TA) from further enforcing its policy. 399 F.Supp. 1032 (S.D.N.Y. 1975). On appeal the TA does not challenge any of Judge Griesa's findings as factually erroneous, nor could it in view of the one-sided record before us. This record, developed over fifteen days of trial, overwhelmingly supports the trial court's findings that, after a brief initial period of adjustment, many former heroin addicts on methadone maintenance are employable and that identification of those who are employable is readily accomplished through regular personnel procedures.

The district court's conclusion of law was that the TA's methadone rule has "no rational relation to the demands

* Of the Southern District of New York, sitting by designation.

of the jobs to be performed." 399 F.Supp. at 1057. This conclusion rests on the solid foundation of *Sugarman v. Dougall*, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973) (policy against employment of aliens unconstitutionally overinclusive), and our own *Crawford v. Cushman*, 531 F.2d 1114, 1123 (2d Cir. 1976) (policy requiring discharge of pregnant Marine unconstitutionally under- and overinclusive), as the United States as amicus curiae points out. *Accord, Cook v. Arentzen* No. 76-1359 (4th Cir. May 6, 1977). The decree is drawn strictly on the basis of the evidence and does not prevent the TA from making regulations to ensure that past or present methadone users are proven to be employable and to prevent their employment in safety-sensitive jobs. Accordingly, we affirm the district court's holding of a constitutional violation and its consequent injunction against further enforcement of the TA policy.

II.

In a supplemental opinion Judge Griesa also held that appellees were entitled to relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., because the TA methadone policy had a racially discriminatory effect. 414 F.Supp. 277 (S.D.N.Y. 1976). Appellees concededly pressed their Title VII claim for the sole purpose of obtaining attorneys' fees under 42 U.S.C. § 2000e-5(k), *see* 414 F.Supp. at 278, and the court did award such fees. We need not reach the Title VII issues in this case, however, because before the decree became final Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, which permits the court in its discretion to allow a prevailing party in a § 1983 action, as here, "a reasonable attorney's fee as part of the costs." After passage

of this statute appellees moved for a declaration that it provided an alternative basis for the award of attorneys' fees in this case, and the district court so ruled. The court awarded to appellees a total fee of \$375,000, of which \$310,000 was compensation for hours worked, \$14,290 was for costs incurred, and the balance was a "premium."

Judge Griesa was correct in holding that the 1976 Act authorized a fee award here, even though it was enacted after most of the services below were rendered. A change in the law is to be given effect in a pending case unless there is some indication to the contrary in the statute or its legislative history or unless manifest injustice would result. *Bradley v. School Board*, 416 U.S. 696, 711, 714-16, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974); *Brown v. General Services Administration*, 507 F.2d 1300, 1305-06 (2d Cir. 1974), *aff'd on other grounds*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976). Here the only reference in the legislative history explicitly supports the Act's application to pending cases, H.R.Rep. No. 94-1558, 94th Cong., 2d Sess. 4 n. 6 (1976), and no manifest injustice from applying the statute to this pending case is alleged. Nor is any injustice alleged from the award of fees itself. Since a party who succeeds in enforcing his civil rights should ordinarily recover his attorneys' fees, unless special circumstances—not alleged here—render such recovery unjust, *see* S.Rep. No. 94-1011, 94th Cong., 2d Sess. 4 (1976) *reprinted in* [1976] U.S. Code Cong. & Admin. News, pp. 5908, 5912, *quoting Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968); *see also Northcross v. Board of Education*, 412 U.S. 427, 428, 93 S.Ct. 2201, 37 L.Ed.2d 48 (1973) (*per curiam*), the awarding of a fee under the 1976 Act was proper.

In addition to arguing against the awarding of any fee, however, appellants contend that the amount awarded was excessive. With regard to the sums awarded for hours worked and costs incurred, we uphold the district court. The requirements of documentation and an evidentiary hearing as to time charges, set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 464-74 (2d Cir. 1974), have been fully met here, and our decision in *Torres v. Sachs*, 538 F.2d 10 (2d Cir. 1976), permitted the district court to use "the same [fee award] standards as in other complex federal litigation," *id.* at 12, without regard to the nonprofit or "public interest" nature of the legal work done for appellees, *see id.* at 13. As to costs, they are frequently awarded by courts to successful parties, and no challenge is made to appellees' itemization here.

We must modify the district court's award, however, to the extent of eliminating the \$50,710 awarded as a "premium." We take the view that this extra award amounted to an abuse of discretion in the particular circumstances of this case. Though complex factual issues were involved, the proof of which required diligent and rather prodigious effort, the legal issues were relatively simple and few. There was no dispute over the governing constitutional doctrines, although their applicability to the facts was a matter requiring considerable persuasive skill. Moreover, the benefits that the suit will bring to the plaintiff class are not altogether concrete. No monetary fund was recovered for the class (although back pay will be recovered by certain individual claimants); appellants are simply enjoined from continuing past policy. Only members of the class who (1) seek employment with the TA and (2) are not denied employment on legitimate grounds unconnected with methadone use will benefit from this litigation. These

two factors, complexity or risk of loss on the legal issues and benefit to the clients, are important considerations in any award of attorneys' fees above an hourly rate. See *City of Detroit v. Grinnell Corp.*, *supra*, 495 F.2d at 470; *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co.*, 481 F.2d 1045, 1050 (2d Cir.), *cert. denied*, 414 U.S. 1092, 94 S.Ct. 722, 38 L.Ed.2d 549 (1973); *Blank v. Talley Industries, Inc.*, 390 F.Supp. 1, 6 (S.D.N.Y. 1975); *Pealo v. Farmers Home Administration*, 412 F.Supp. 561, 567 (D.D.C. 1976). Since neither factor argues in favor of an extra award here, we must heed our own admonition to scrutinize attorneys' fee applications with an "eye to moderation," seeking to avoid either the reality or the appearance of awarding "windfall fees." *City of Detroit v. Grinnell Corp.*, *supra*, 495 F.2d at 469, 470. We reduce the award by \$50,710 and otherwise affirm it.

III.

Cross-appellants Beazer, Reyes and Wright, three of the named plaintiffs in this class action, were denied individual relief—reinstatement and back pay—by the district court solely on the basis that, by being heroin users while working with the TA before their methadone treatment, they had violated a TA rule prohibiting heroin use. In each case, however, the TA's decision to discharge was not grounded on any violation of the heroin rule, but rather solely on use of methadone. Since this reason was unconstitutional, as above explicated, the court erred in denying individual relief.

The TA's argument against individual relief amounts to an attempt to evade the full force of the district court's holding. The TA first discharged the three employees for one reason and then years later, when that reason was held

to be illegal, it sought to avoid any remedy for its wrong by asserting other reasons, never before articulated, why the employees could have been discharged at an earlier time. In the case of such illegal discharges, the wrong done by the employer consists not of discharging the employee but of discharging him for an illegal reason. It is irrelevant to the consideration of a remedy for that wrong that the wrong might have been avoided by a discharge for a legal reason. Cf. *NLRB v. George J. Roberts & Sons, Inc.*, 451 F.2d 941, 945 (2d Cir. 1971) (if discharge of employee occurred even partially for motive that violated labor laws, he has suffered a remediable wrong, even if ample valid grounds existed for his discharge); *NLRB v. Pembeck Oil Corp.*, 404 F.2d 105, 109 (2d Cir. 1968) (same), *vacated on other grounds*, 395 U.S. 828, 89 S.Ct. 2125, 23 L.Ed.2d 737 (1969). The wrong being proven, the only question remaining is how best to make the discharged employee whole for the violation of his rights. Cf. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763-64, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976) (remedies under Title VII of 1964 Civil Rights Act for victims of employment discrimination).

Certainly nothing in the record here indicates that the TA at the time of the methadone discharges considered alternatively discharging Beazer, Reyes, and Wright for violation of the heroin use rule. All indications are to the contrary, that the current assertions of the heroin use ground amount to "counsel's *post hoc* rationalizations," *FPC v. Texaco, Inc.*, 417 U.S. 380, 397, 94 S.Ct. 2315, 41 L.Ed.2d 141 (1974), quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962). As for other grounds on which the three individuals might have been discharged—such as Beazer's al-

leged poor attendance record—these were also not raised until after the district court had held the methadone ground unconstitutional. In any event, the district court examined the records and found these grounds insufficient, and if such a traditional employment problem arises after these three individuals are reinstated, that would provide an independent ground for a new discharge.

The remedies of hiring and back pay were ordered by the district court for two of the individual plaintiffs, and we affirm that holding as consistent with making those plaintiffs whole for the denial of their constitutional rights. We further believe that the same remedies should be ordered for Beazer, Reyes, and Wright, who are in essentially the same position as the other two in having lost or been denied employment for an illegal reason. We accordingly reverse the judgment as to these three plaintiffs and remand to the district court for a determination of the positions to which they should be reinstated and the amount of back pay due to them.

Judgment in accordance with opinion.

APPENDIX B

Opinion and Judgment of the United States Court of Appeals, Second Circuit, Entered February 1, 1978

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the First day of February, one thousand nine hundred and seventy-eight.

76-7295

77-7092

CARL A. BEAZER, *et al.*,

*Plaintiffs-Appellees-
Cross-Appellants,*

—v.—

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,

*Defendants-Appellants-
Cross-Appellees.*

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants-cross-appellees, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
Chief Judge
Irving R. Kaufman

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of February, one thousand nine hundred and seventy-eight.

Present:

HON. WALTER R. MANSFIELD,
HON. JAMES L. OAKES,
Circuit Judges.
HON. CHARLES L. BRIANT,
District Judge.

76-7295,
77-7092

CARL A. BEAZER, *et al.*,
*Plaintiffs-Appellees-
Cross-Appellants,*

—v.—

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,
*Defendants-Appellants-
Cross-Appellees.*

A petition for a rehearing having been filed herein by counsel for the appellants-cross-appellees,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

/s/ A. DANIEL FUSARO
A. DANIEL FUSARO
Clerk

APPENDIX C

Opinion and Judgment of the District Court of the
Southern District of New York, Entered August 6, 1975

CARL A. BEAZER, *et al.*,

Plaintiffs,

—v.—

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,

Defendants.

No. 72 Civ. 5307.

UNITED STATES DISTRICT COURT, S. D. NEW YORK

Aug. 6, 1975.

Erie D. Balber, Mark C. Morril, Elizabeth B. DuBois, Legal Action Center for the City of New York, New York City, for plaintiffs.

Edward W. Summers, Brooklyn, N. Y., and Gilbert T. Dunn, of counsel, for Transit Auth.

A. Michael Weber, Brooklyn, N. Y., Asst. Corp. Counsel, for Civil Service Commission.

William A. Roskin, New York City, for Dept. of Personnel, Civil Service Commission.

OPINION

GRIESA, *District Judge.*

This is a class action against the New York City Transit Authority ("TA") and the Manhattan and Bronx Surface

Transit Operating Authority ("MABSTOA") and certain of their officials. For convenience, both of these entities will usually be referred to hereafter collectively as "the TA." Also sued are the New York City Civil Service Commission and the New York City Personnel Department and certain officials thereof.

The action challenges the blanket exclusion from any form of employment in the New York City subway and bus systems of all former heroin addicts participating in methadone maintenance programs, regardless of the individual merits of the employee or the applicant. Plaintiffs also allege that there is a similar exclusionary policy even against former heroin addicts who have successfully *concluded* their participation in a methadone program.

The amended complaint alleges that this policy violates the due process and equal protection clauses of the Fourteenth Amendment, and federal civil rights statutes, 42 U.S.C. §§ 1981 and 1983. The claim is that there is no legal basis for classifying all present and former methadone maintenance patients as unemployable for any position in the TA.

Plaintiffs also allege that the exclusionary policy has a disparate impact on blacks and Hispanics, resulting in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*

Jurisdiction is invoked under 28 U.S.C. §§ 1331(a) and 1343(3) and (4), and also 42 U.S.C. §§ 2000e-5(f)(3).

Plaintiffs seek declaratory and injunctive relief on behalf of the class, and certain monetary relief on behalf of the named plaintiffs.

PARTIES

The Four Named Plaintiffs

Carl A. Beazer, a black, is 40 years old. Beazer started working for the TA in 1960 as a subway car cleaner. He was promoted to subway conductor in 1961, and was further promoted to towerman in 1966. Beazer was dismissed from his employment on November 26, 1971 after a heroin addiction problem came to light.

Beazer had been a heroin addict since about 1952. This addiction continued during virtually the entire time of his employment by the TA, lasting until May 1971, when he entered into the methadone maintenance program of the Veterans Administration. He has been a successful participant in the methadone maintenance program since that time. The uncontradicted evidence is that, like many new methadone patients, he experimented briefly with the resumption of heroin during the early days of his methadone treatment, but he has been entirely free of heroin or other illicit drug use for over three years. Beazer ceased using methadone in November 1973.

Following his dismissal from the TA, Beazer has been steadily employed—first as a counselor in the Detoxification Program of the Veterans Administration, then as a supervisor with the Addiction Research and Treatment Corp. (engaged in drug rehabilitation work) and now as a Division Chief with an organization known as Wildcat Services, which employs methadone patients to perform building maintenance work.

The TA's Impartial Disciplinary Review Board made a finding that Beazer was handling his job at the TA competently at the time of the termination proceedings, while he was participating in the methadone program. Beazer was

nevertheless terminated for violation of the TA's rule against narcotic usage.

Beazer's employment in his various positions since leaving the TA appears to have been in all respects satisfactory. Beazer was formerly married but is divorced.

Jose R. Reyes, an Hispanic, is 29 years old. Reyes was employed by the TA in 1968 as a Maintainer's Helper—Group B (Mason), and in 1970 was promoted to Ventilation and Drainage Maintainer. Reyes was dismissed on January 20, 1972, after a medical examination showed evidence of the use of methadone.

Reyes was a heroin user from about 1961 until February 1971, when he enrolled in a methadone maintenance program at St. Claire's Hospital. This program is under the supervision of the Beth Israel Medical Center. The uncontradicted evidence is that Reyes has been a satisfactory participant in the methadone maintenance program. Reyes is still maintained on methadone, although he is in the process of withdrawing.

Following his dismissal from the TA, Reyes was employed in the methadone maintenance program of Mount Sinai Hospital. At present he is a full-time student at Fordham University. Reyes is married and has two children.

Malcolm Frasier, a black, is 31 years old. In February 1971 Frasier applied for a position as a Bus Operator with MABSTOA, but was rejected because his driver's license had been suspended. Frasier applied for the same position again in early 1973. However, in March 1973, when Frasier reported for processing he disclosed that he was a methadone maintenance patient. He was therefore rejected for the position of Bus Operator. Frasier

also applied at about this time for the position of Bus Cleaner, but in April 1973 was rejected because of his former methadone use.

Frasier used heroin from about 1968 until his entry into the Mary Scranton Foundation methadone maintenance program in October 1972. He was a successful participant in this program, and terminated the use of methadone in March 1973.

From about 1964 to early 1974 Frasier was employed as a truck driver and a taxicab driver. Since early 1974 Frasier has been a shipping clerk for Baker, Knapp & Tubbs Furniture Co.

Francisco Diaz, an Hispanic, is 40 years old. In 1970 Diaz applied at the TA for the position of Maintainer's Helper—Group D (Sheet Metal). Diaz was rejected when he disclosed that he was a methadone maintenance patient.

Diaz was a heroin user commencing about 1950 until he entered the methadone maintenance program of Beth Israel Medical Center in December 1968. Diaz continues to participate in the methadone program.

Out of the four named plaintiffs, Diaz is the only one about whom any genuine question has been raised regarding his conduct while on the methadone program. Various clinical notes indicate suspicions of illicit narcotics use and alcohol use.

However, Diaz has a long record of stable employment. From 1962 until 1973 he was employed as a sheet metal worker. Since 1973 he has been employed as a helper in a commercial bakery. There is no indication of any deficiency in Diaz's performance in either job. Diaz is married and has a wife and children.

The Class

Basically the class represented by the named plaintiffs consists of all those persons who have been, or would in the future be, subject to dismissal or rejection as to employment by the TA on the ground of present or past participation in methadone maintenance programs.

At one point in the proceedings there was consideration as to whether the class should be expanded to cover former heroin addicts who had become drug-free without the use of methadone. However, it has been agreed by all parties, with the concurrence of the court, that the class should not include this latter group.

Defendants

The TA is a public benefit corporation organized under the laws of the State of New York. The TA operates the subway system of New York City and certain bus lines in the city.

MABSTOA is also a public benefit corporation organized under New York law, and is a subsidiary of the TA. It operates certain bus lines in New York City.

Defendant William J. Ronan was chairman of the TA and MABSTOA from March 1968 until May 1974.

Defendant David Yunich succeeded to the above positions in May 1974.

Defendants William L. Butcher, Lawrence R. Bailey, Harold L. Fisher, Constantine Sidamon-Eristoff, Donald H. Ellito, Edwin G. Michaelian and Mortimer Gleeson, along with defendant Yunich, constitute the total membership of the TA and the directors of MABSTOA.

Defendants Frederic B. Powers and William A. Shea were members of the TA and were directors of MABSTOA

at the time this action was originally filed, and were subsequently succeeded by defendants Michaelian and Sidamon-Eristoff.

Defendant Wilbur B. McLaren is Executive Officer in charge of labor relations and personnel for the TA.

Defendant Louis Lanzetta is Medical Director of the TA.

Also joined as defendants are the Civil Service Commission of the City of New York and the Personnel Department of the City of New York; Harry I. Bronstein, Chairman of the Civil Service Commission and Director of the Personnel Department; and David Stadtmauer and James W. Smith, members of the Civil Service Commission.

In the case of all individuals, the amended complaint names also their "successors in office."

Defendants' Policy Regarding Methadone

It is the general policy of the TA that no person using narcotic drugs may be employed. Rule 11(b) of the TA's Rules and Regulations provides:

"(b) Employees must not use, or have in their possession, narcotics, tranquilizers, drugs of the Amphetamine group or barbiturate derivatives or paraphernalia used to administer narcotics or barbiturate derivatives, except with the written permission of the Medical Director—Chief Surgeon of the System."

Methadone is regarded as a narcotic within the meaning of Rule 11(b). It is stipulated that no written permission has ever been given by the Medical Director for the employment of a person using methadone.

The effect of this policy is that, if it is revealed that a current employee of the TA is a user of methadone, he will be discharged, or if an applicant for employment is a user of methadone, he will not be employed. This policy applies to all positions in the TA regardless of whether they are operating or nonoperating positions. Moreover, the policy operates as an absolute exclusion—no consideration being given to individual factors such as recent employment history, successful adherence to a methadone program, or evidence of freedom from heroin use.

The situation is not entirely clear with respect to the policy of the TA regarding persons who have successfully concluded participation in a methadone program. The reason that the policy is not fully crystalized is that the question has not arisen in practice to any appreciable extent. It is clear that a relatively recent methadone user would be subject to the blanket exclusionary policy. However, the TA has indicated that there might be some flexibility with respect to a person who had once used methadone, but had been free of such use for a period of five years or more. But even on this point, there is no official directive indicating that the person would be considered for employment.

The reasons given by the TA as a basis for this policy will be dealt with in detail later in this opinion. They can be summarized now as follows. Methadone maintenance, as a treatment for heroin addiction, has been developed relatively recently. The TA contends that the use of methadone in place of heroin is merely the substitution of one narcotic for another. The TA asserts that methadone maintenance treatment fails to a significant degree in remedying the basic problems of heroin addiction—with the result that a methadone maintenance patient embodies

the underlying character defects which caused him to turn to heroin in the first place, and that there is a substantial risk that such a person, while on methadone, will revert to heroin or turn to other drugs or alcohol abuse. The TA contends also that there are significant adverse physiological effects from methadone itself, which would impair the performance of such person as an employee even if he faithfully refrained from heroin or other illicit drugs or alcohol abuse. The TA further contends that its operations involve such serious problems of safety, both with respect to the public and to the employees, that they cannot prudently employ present or past methadone patients. Finally, the TA argues that there is no satisfactory way of screening the reliable methadone patient from the unreliable, so that it is administratively necessary to have a blanket exclusionary policy.

Summary of Conclusions

I have concluded that the blanket exclusionary policy of the TA against methadone maintenance patients is constitutionally invalid. Plaintiffs have more than sustained their burden of proving that there are substantial numbers of persons on methadone maintenance who are as fit for employment as other comparable persons.

No one can have the slightest doubt about the heavy responsibilities of the TA to the public, including their duty respecting the safety of millions of persons who are carried on its subways and buses. However, in my view, the blanket exclusionary policy against persons on methadone maintenance is not rationally related to the safety needs, or any other needs, of the TA.

I have concluded that the policy is the result of a misunderstanding by the TA regarding the nature and effects

of methadone maintenance. I do not say this in any spirit of criticism. The information about methadone maintenance in the public domain is all too fragmentary and confusing. Myths and misconceptions abound. On the other hand, the trial of this case has afforded a unique opportunity to explore in depth the somewhat controversial issues surrounding methadone. A balanced and realistic view of the subject is possible as a result.

I should note that after about six days of trial the parties advised me that they were virtually finished with the presentation of their evidence. However, I was concerned about what appeared to be a disproportionately one-sided array of proof. Plaintiffs had introduced the testimony of an impressive group of experts, corroborated by laboratory and other tests, to the effect that a former heroin addict properly "stabilized" on methadone is free of undesirable narcotic effects and is entirely normal as regards mental and physical capabilities. The evidence demonstrated that methadone maintained persons were successfully employed in jobs of many kinds.

As against this, the TA had brought forward a single expert witness, a pharmacologist, to present theories about certain adverse characteristics of methadone. However, the knowledge and experience of this witness regarding methadone maintenance were so limited that his testimony was of little value. The TA called its personnel director and medical director, who both testified to certain theories they held regarding methadone maintenance. However, these officials naturally lacked the depth of expertise possessed by plaintiffs' witnesses on this subject.

The situation raised a serious question as to whether all sides of the problems involved in the case had been thoroughly explored, or whether any negative aspects of

methadone and methadone maintenance programs existed that had not been presented. I therefore requested the attorneys for the parties to submit proposals for further witnesses. The result was an additional nine days of trial at which exhaustive effort was made to probe the relevant questions with experts of varying points of view.

The picture which emerges from all the evidence is basically this. There are some 40,000 persons in New York City on methadone maintenance. It is, at present, the most widely used method for rehabilitating heroin addicts. Among these 40,000 persons on methadone maintenance there is a great variation (as there is in the population as a whole) with regard to characteristics such as educational qualifications, employment skills and background, anti-social behavior, alcohol usage, and abuse of illicit drugs. But the crucial point made so strongly by plaintiffs' witnesses was never convincingly challenged—that methadone as administered in the maintenance programs can successfully erase the physical effects of heroin addiction and permit a former heroin addict to function normally both mentally and physically. It is further proved beyond any real dispute that among the 40,000 persons in New York City on methadone maintenance (as in any comparable group of 40,000 New Yorkers), there are substantial numbers who are free of anti-social behavior and free of the abuse of alcohol or illicit drugs; that such persons are capable of employment and many are indeed employed. It is further clear that the employable can be identified by a prospective employer by essentially the same type of procedures used to identify other persons who would make good and reliable employees. Finally, it has been demonstrated that the TA has ways of monitoring employees after they have been hired, which can be used

for persons on methadone maintenance just as they are used for other persons employed by the TA.

This proof applies with equal, if not greater, force to those former heroin addicts who have successfully completed participation in a methadone program.

I have therefore concluded that the present blanket exclusionary policy of the TA against employing, or considering for employment, any past or present methadone maintained person regardless of his individual merits, is unconstitutional.

Facts

Heroin

It will be important to understand the differences between methadone and heroin.

Heroin is a narcotic which is generally injected into the bloodstream by a needle. It is a central nervous system depressant. The usual effect is to create a "high"—euphoria, drowsiness—for about thirty minutes, which then tapers off over a period of about three or four hours. At the end of this time the heroin user experiences sickness and discomfort known as "withdrawal symptoms." There is intense craving for another shot of heroin, after which the cycle starts over again. A typical addict will inject heroin several times a day.

There are variations in the severity of heroin addiction. For instance, it is possible for a heroin addict to take moderate amounts of the drug—just enough to avoid the withdrawal symptoms, without producing the euphoric highs. Such a person might function somewhat normally. However, this type of controlled heroin addict is very rare.

Methadone

Methadone is a synthetic narcotic and a central nervous system depressant. If injected into the bloodstream with a needle, it can produce basically the same effects as heroin.

Methadone has been used, under medical controls, as a pain killer. Also, methadone is used in "detoxification units" of hospitals to take addicts off of heroin. This is done by switching a heroin addict to methadone and gradually reducing the doses of methadone to zero over a period of about three weeks. The patient thus detoxified is drug free. Moreover, it is hoped that the program of gradually reduced doses of methadone leaves him without the withdrawal symptoms, or the "physical dependence" on a narcotic.

It appears that these detoxification programs, without a follow-up of further treatment are frequently unsuccessful, and that there is a high incidence of reversion to heroin. There are various theories about why this is so. Persons involved in programs such as Phoenix House and Odyssey House take the view that the reason that "physical" detoxification is not enough is because the underlying causes of heroin addiction are psychological problems and problems of life-style, which must be addressed in an appropriate manner.

On the other hand, there is a body of opinion which holds that, in addition to psychological and life-style problems, there are some physical problems from heroin addiction which persist after any short-run detoxification. This theory is that there is a physical discomfort or a physical dependence, which requires treatment. The major treatment method thus far devised is maintenance on stable doses of methadone. Such methadone maintenance is

feasible because of the following characteristics of methadone.

We are dealing here with methadone taken orally. When taken orally, methadone is radically different from heroin. Whereas heroin moves rapidly in and out of the bloodstream causing violent highs and lows, oral methadone passes into the body tissues, and then is fed into the bloodstream gradually over a period of twenty-four hours or more. There is a relatively constant or stable level of methadone in the blood during this time. When a person is first on oral methadone he may experience narcotic effect in some degree—such as euphoria, and drowsiness. But it has been found that the body will become tolerant to oral methadone rather quickly, and that after this tolerance is achieved, any narcotic effect ceases. The evidence is that a person who has attained this tolerance can take a constant dose of methadone once a day and has neither the euphoric effects nor the withdrawal symptoms associated with heroin.

The question arises as to what purpose there is in taking methadone if no euphoria or pleasurable effects are obtained. According to the expert evidence, the purpose is two-fold: *First*, methadone produces what is called a "blockade" or "cross-tolerance," which prevents a methadone user from experiencing any "high" from injecting heroin. It should be noted that this cross-tolerance does not apply when the methadone user attempts to use substances other than heroin—such as cocaine, barbiturates, amphetamines, or alcohol. *Second*, experience indicates that former heroin addicts may have some symptoms of discomfort or drug dependence for a fairly long period of time after discontinuing the use of heroin. The nature of these symptoms obviously varies to some extent from

individual to individual. The precise cause of such symptoms is a matter of some debate—as to whether the cause is physical or psychological or a combination of both. These matters do not require a detailed exploration in this opinion. The evidence convinces me that the symptoms we are talking about are what would generally be considered medical or physical symptoms. Clearly they are not, in and of themselves, mental or psychiatric deficiencies or disorders. In any event, the uncontradicted evidence is that these symptoms are cured by stable dosage of methadone.

Origin of Methadone Maintenance Programs

It is well known that methadone maintenance, as a treatment for heroin addiction, originated with Dr. Vincent Dole and his wife, Dr. Marie Nyswander, at Rockefeller University. Dr. Dole testified in this case.

In 1963 Dr. Dole became Chairman of the New York City Health Department's Health Research Committee on narcotics, and entered into an intense research activity regarding narcotics. One of his projects was to determine if narcotics addicts could be stabilized on medically controlled doses of drugs. In other words, could the radical highs and lows be eliminated by some constant dosage of a drug? He found that this was impossible with short-acting injectible drugs such as heroin and morphine. However, the results were radically different when he tried oral methadone. Drs. Dole and Nyswander found through their experiments that heroin addicts could become stabilized on constant doses of methadone with the results described earlier in this opinion.

A demonstration methadone maintenance program was set up at the Beth Israel Medical Center. Twelve patients

were admitted in the first group and by 1965 about 200 patients were being treated. At this time, Dr. Harold R. Trigg, who was head of the Narcotics Detoxification Service at Beth Israel, became interested in the methadone maintenance project. Dr. Trigg later became, and still is, Chief of the Methadone Maintenance Program of the Beth Israel Medical Center. At the present time Beth Israel treats about 6500 persons on methadone maintenance in 35 separate clinics. Dr. Trigg testified in this case.

As indicated earlier in this opinion, there is substantial agreement that many persons attempting to overcome heroin addiction have psychological or life-style problems which reach beyond what can be cured by the physical taking of doses of methadone. Dr. Dole and his associates were acutely aware of this. Consequently the pattern which was developed in the Beth Israel program and in methadone maintenance programs subsequently established was to provide a variety of services including counseling, medical and psychiatric care, educational and vocational guidance, and recreational facilities. Certain minimum standards with respect to these services are set forth by both federal and state regulations.

Current Methadone Maintenance Programs

Today there are approximately 75,000 persons under methadone maintenance treatment in the United States, of which about 40,000 are in New York City.

The methadone maintenance programs are of two basic types. The first type is referred to as "public" or "semi-public." These programs are non-profit. The second type is referred to as "private." These programs are operated for profit.

The five major public or semi-public methadone maintenance programs in New York City are:

- (1) The Beth Israel program, referred to above, with 35 clinics treating 7100 patients;¹
- (2) A program administered by the City of New York with 39 clinics treating 12,400 patients (hereafter referred to as "the City program");
- (3) A program administered by the Bronx State Hospital and the Albert Einstein College of Medicine, with 7 clinics treating about 2400 patients;
- (4) A program operated by the Addiction Research and Treatment Center (ARTC) with 6 clinics treating about 1200 patients; and
- (5) A program operated by the New York State Drug Abuse Control Commission (DACC), with 8 clinics treating about 1100 patients.

The total number of patients treated in public or semi-public programs is about 26,000. It appears that these programs are financed almost entirely by federal, state and city funds.

There are about 25 private programs in New York City treating a total of about 14,000 patients.

All methadone maintenance programs throughout the United States are required to comply with regulations of the Food and Drug Administration, promulgated December 15, 1972, 21 C.F.R. § 130, *et seq.* Programs in New York State are required to comply, in addition, with the somewhat

¹ The figures given in this section are from the testimony of Dr. Frances Gearing, of the Columbia University School of Public Health. These figures are as of December 31, 1974.

more stringent regulations of the New York Drug Abuse Control Commission, promulgated in May 1974, 14 N.Y.C. R.R., Part 2021.

Compliance with these regulations is monitored by the DACC, which acts on behalf of the state and also on behalf of the federal government by contract.

Both the federal and state regulations set forth requirements for the types of persons who can be admitted to the program, the kinds of services which must be rendered, the staffing of the programs, the days and hours of operation and record keeping, controls on the administration of methadone, and tests for illicit drug usage.

A number of the clinics under the aegis of both the Beth Israel and the City programs are located in hospitals not operated either by the City or by Beth Israel. These arrangements are pursuant to contract. The standards for the clinics are set by Beth Israel and the City. The hospitals provide facilities and assist in various ways such as consultation in the hiring of personnel. Fourteen of the Beth Israel clinics and 36 of the City clinics are operated in this way. Among the hospitals where City methadone maintenance clinics are located are New York Hospital, Knickerbocker Hospital, Harlem Hospital, Bellevue Hospital, Elmhurst Hospital and Beekman Downtown Hospital.

The Course of Methadone Maintenance Treatment

In order to become enrolled in a methadone program, a person is supposed to have been a heroin addict for at least two years. In other words, the sole purpose of these programs is for the cure of heroin addiction.

When an applicant is accepted for a program, the first step is to have him detoxified from heroin and from any other illicit drug abuse or alcohol abuse. For this purpose

a short period of in-patient treatment at a hospital is usually required.

In connection with this process, a stable or constant dosage of methadone is worked out to be administered to the patient over a protracted period of time. Among methadone maintenance programs there are basically two theories regarding maintenance on stable doses. There are what are termed "high dose" programs, where the dosage is in the range of 80-100 milligrams per dose. Beth Israel is a high dose program. The philosophy of such programs is to give the patient sufficient methadone to make sure that any physical dependence or craving for heroin will be eliminated and to make sure that the blockade or cross-tolerance against heroin is effective. The proponents of such programs further believe that there should be no pressure upon methadone patients to discontinue methadone; that there is nothing intrinsically wrong or harmful about the usage of methadone over an indefinite period of time; that such usage is essentially medicinal; and that the sole criterion which should be used to determine whether or not the patient should be on methadone is his ability to function properly in society.

The "low dose" programs have a somewhat different philosophy. Their proponents believe that the proper goal for a methadone maintenance program should be to have the patient on the program as short a time as possible, that the proper goal of a methadone maintenance program should be detoxification not only from heroin, but also from methadone. They believe that detoxification from low doses of methadone is easier than from high doses, and thus favor the low doses. Addiction Research and Treatment Corp., which has clinics in Brooklyn and Harlem, conducts a low dose program.

However, except for the differences noted above, the basic functioning of the high dose and low dose programs is similar. After detoxification from illicit drug abuse, the patient commences taking constant doses of methadone each day. Under federal and state regulations, a patient is required to appear at the clinic and take his dosage of methadone in the presence of a staff member at least six six days a week for the first three months. The seventh day's dose may be taken at home. After a certain period of time, if the patient's conduct is satisfactory, he may be permitted to reduce his attendance at the clinic and take more of his daily doses at home. However, even after two years of participation in a program, the patient is required to make a minimum of two visits to the clinic each week.

The patient must participate in counseling—at first on a daily basis, and less frequently as time goes on.

The patient must be observed in various ways to determine whether he is abusing drugs or alcohol. It appears that methadone patients, at least in the first stages of treatment, sometimes attempt to return to heroin. But the uncontradicted evidence is that the blockade or cross-tolerance is indeed effective, and that persons on methadone are no longer able to find satisfaction in heroin; and then generally stop trying. However, for one reason or another, such as a possible lapse in methadone dosage, a patient might occasionally revert to heroin in a serious fashion. In any event, urine tests for heroin usage are required by federal and state regulations to be administered at least once a week.

The evidence further shows that, by the use of a somewhat different chemical analysis, a urine test will reveal other drugs such as barbiturates, and amphetamines, al-

though detection of cocaine is difficult. Federal regulations require urine tests once a month for evidence of drugs other than heroin. It further appears that clinics such as Beth Israel take steps to make sure that their patients are frequently observed to determine whether there is any drug abuse revealed by behavior or appearance. These clinics also watch closely for signs of excess drinking.

These clinics also take precautions against abuse of methadone. One problem is the possibility that a patient may take excessive quantities of methadone, over and above the dose prescribed by the clinic. It is conceivable that he might do this by obtaining methadone on the black market, or by taking two or three days' doses at one time where the clinic has given him methadone to be administered outside the clinic. A different type of problem is the possibility that a methadone patient might sell his methadone outside the clinic, instead of taking it himself.

Various precautions are taken to guard against either type of abuse—including strict control of the issuance of methadone doses, observations of the behavior of the patients, and observation of any signs of manipulation (*i.e.*, stories by the patient of losing his methadone, etc.).

It appears that during the first few months that a patient is on a methadone maintenance program, it will become reasonably apparent whether he is genuinely determined to rid himself of illicit drug usage and is conducting himself accordingly. There is a certain proportion of methadone maintenance patients who do *not* thus conform—who are showing evidence of illicit drug use of excessive drinking, who make little or no attempt at rehabilitation, who loiter or otherwise engage in undesirable conduct. These are what those experienced in the field call the "visible" cases. Many of them drop out of the programs

within the first few months or the first year. Many of them are discharged. In some cases such patients are kept on in the hope of improvement. But their situation is evident to clinic personnel. As far as employment is concerned, the evidence indicates convincingly that the clinic personnel are not likely to refer or recommend such persons.

For patients who do perform satisfactorily on the program, treatment will generally continue a year or more. The longest term of methadone maintenance treatment revealed in the record in the present case is four years. Often however, the patient reaches a point where he desires to terminate his usage of methadone. He believes that he can do without it, and wishes to avoid the trouble of frequent appearances at the clinic. In such a case, the dosage of methadone is reduced to zero over a period of time. Many patients, after terminating usage of methadone, function normally without it. Some find that they return to methadone maintenance.

Physical Effects of Methadone

Two basic questions arise with respect to the employability of methadone maintenance patients. The first is whether methadone maintenance patients will have any narcotic effects or other side effects related to the usage of methadone. The second is whether the patient will return to heroin, or will abuse other illicit drugs or alcohol. Both of these questions have been referred to in earlier portions of this opinion. However, they merit further discussion.

As an initial proposition, one might assume that methadone, being a narcotic and a central nervous system de-

pressant such as heroin, must inevitably produce narcotic effects such as euphoria, drowsiness, inattention, departure from reality, and slowing of reactions.

The TA's expert witness, Dr. Vincent Lynch, a pharmacologist, testified that methadone "undoubtedly" occupies parts of the brain which would affect "cognitive faculties, the ability to respond voluntarily in certain situations." Dr. Lynch also testified that even in a person who has been maintained on a stable dose of methadone for a period of time, the person's functions would be inhibited for a short period of time each day after taking his dose of methadone. Dr. Lynch disputed the idea that a methadone patient could really be "stabilized" on a constant dose. His opinion was that a tolerance would be attained which would make methadone ineffective to prevent the discomfort or physical dependence causing the heroin craving.

Considering Dr. Lynch's testimony in the light of the evidence as a whole, I find Dr. Lynch's testimony to be too speculative to be of much value. For instance, Dr. Lynch's methadone "tolerance" theory was not based on any tests with human beings, and appears to ignore the marked differences between methadone and other drugs such as heroin.

The overwhelming weight of the evidence is to the effect that a methadone maintenance patient can perform normally, and that undesirable side effects are lacking.

It appears that during the twelve years that have elapsed since the initial investigations of methadone maintenance, there has been a remarkably intensive effort to test and observe methadone maintenance patients and to gather statistics about their performance. Dr. Robert DuPont, Jr., Director of the Special Action Office of Drug Abuse Prevention in The White House, and Di-

rector of the National Institute on Drug Abuse in the Department of Health, Education and Welfare, testified that there had been a "vast array of tests" regarding the ability to drive vehicles, ability to maneuver the hands, reaction to signals, sleep patterns, sexuality, and that the evidence is "that the person who is maintained on methadone performs within the normal range of expectation of a normal population."

The detailed results of a number of such tests were introduced into evidence in this action, and indicated normal behavior by methadone maintenance patients.

Dr. Vincent Dole testified regarding his many years of observation of persons stabilized on methadone, and stated:

"Q. Doctor, has your physiological research or that of your colleagues indicated that there is any disruption of the cognitive faculties when a person is maintained on methadone?"

"A. No. On the contrary, we have much data by now that the cognitive and other emotional and intellectual faculties of the mind are normal. We have done the types of tests that you already probably had reported through Dr. Gordon's laboratory on specific things such as IQ measurements and various other perceptual tasks. What probably is more important to this point is now a very large record with some tens of thousands of patients who have gone to school and had high grades, who have accomplished much in responsible jobs, in business and elsewhere."

Regarding the possibility of a methadone maintenance patient obtaining heroin-type euphoria, Dr. Dole testified that many patients have come into methadone treatment

centers "on the mistaken theory that they were going to get a free ride and a free euphoria for a long time" and that such patients have very soon discovered "that they do not get euphoria."

Dr. Paul Cushman, Jr., Director of the Methadone Maintenance Clinic of St. Luke's Hospital (a clinic operated under the direction of the Beth Israel Medical Center) testified that he had seen thousands of methadone maintenance patients and that they are basically "indistinguishable" from "comparable non-drug people." Dr. Cushman testified that as to characteristics such as alertness, ability to handle challenges, ability to perform work such as electrical circuit work, welding, mechanical repairs, and so forth—there is "no difference between a normal subject and the methadone maintained patient after he has been stabilized on his methadone."

Dr. Irving Lukoff, of the Addiction Research and Treatment Corporation, has been performing research for some years with respect to the results of methadone maintenance. Dr. Lukoff contributed much of the factual material for an article entitled "Methadone, The Forlorn Hope" by Edward J. Epstein in the Summer 1974 issue of *The Public Interest*.² This article raised a number of questions about methadone maintenance, including the problem that many persons who commence maintenance programs drop out or are discharged.³ For purposes of the present case,

² Methadone maintenance has received both criticism and commendation in articles, books—and an occasional television item. The Epstein article questions certain of the medical theories espoused by Dr. Dole and his associates and questions certain statistics sometimes used to show the favorable results of methadone maintenance. For instance, the Epstein article cites certain "evidence" and authorities against the "blockade" theory of methadone.

Of course, my findings and conclusions in the present case must rest on the testimony and other evidence introduced in

the important point is that persons who remain in a methadone maintenance program for a substantial period of time are the result of a "self-cleansing" process which goes on in the program, according to Dr. Lukoff. Dr. Lukoff testified that he has seen hundreds of patients maintained on methadone who function normally in terms of all obvious signs, and that they are "functioning the way everybody else does."

Dr. Seymour Joseph, Deputy Commissioner of the New York State Drug Abuse Control Commission, testified that when a person is stabilized on methadone there are no deficiencies in day-to-day conduct such as ability to think and perform required functions.

Dr. Joyce Lowinson, who was responsible for the first methadone maintenance unit under Dr. Vincent Dole, and since 1968 has been in charge of the methadone maintenance program at Bronx State Hospital, testified that participants who are stabilized on methadone function normally, and that there is "no way of distinguishing a person on methadone from a person who is not on methadone" except by means of a urine or blood test revealing the presence of the substance. In contrast to Dr. Lynch's testimony that a person stabilized on methadone will feel a narcotic effect for a period of time immediately after taking his daily dose, Dr. Lowinson testified that such a

the case, rather than on the views of authors expressed in articles, where these authors would not be subject to cross-examination about the extent of their knowledge, etc. But I would note a statement quoted with approval in the Epstein article by Dr. Avram Goldstein, director of the Addiction Research Laboratory at Stanford:

"Nothing I have said should be interpreted as 'debunking' methadone or derogating its importance. It is a fantastically effective tool for bringing addicts into a new and helpful kind of therapeutic environment."

person, when he takes the daily dose of methadone, "is in no way changed, and is no different after he has taken his medication." Dr. Lowinson contrasted the taking of the dose of methadone with what results from the injection of heroin where there is the immediate "rush" or "high."

There was also considerable evidence on the question of whether methadone maintenance produces undesirable "side effects." The evidence is that, during the time patients are being brought up to their constant dosage of methadone (a period of about six weeks), there may be complaints of drowsiness, insomnia, excess sweating, constipation, and perhaps some other symptoms. After the patient is stabilized, he becomes tolerant to methadone and side effects diminish and largely disappear. However, some side effects may persist. For instance, in a group of methadone maintenance patients studied by Dr. Mary Kreek of Rockefeller University, 48% were experiencing excessive sweating; 17% had constipation; 16% had insomnia; 22% had some libido problem. However, the evidence is clear that these conditions do not particularly differentiate this group from other parts of the population. Moreover, except in rare cases, such conditions have no effect upon employability. For instance, the constipation problems could be cured by a common laxative.

The TA referred at the trial to a "package insert" which is required by FDA regulations to be included with methadone sold to physicians, hospitals, and clinics. The package insert contains a description of various matters, including warnings about possible side effects. The package insert states in part:

"Use in Ambulatory Patients—Methadone may impair the mental and/or physical abilities required for

the performance of potentially hazardous tasks, such as driving a car or operating machinery. The patient should be cautioned accordingly.

"Methadone, like other narcotics may produce orthostatic hypotension in ambulatory patients."

There was extensive inquiry at the trial about the significance of this warning, justifying in my view, the following findings: Warnings in package inserts such as this one tend to include every *possible* adverse effect that might occur under *any* circumstances of usage. Although the side effects referred to in this warning might occur where methadone is being used as a pain killer or for some similar purpose, such effects do not occur in a person stabilized on a constant dose of methadone.

To summarize my conclusions on the subject, I find that a person maintained on a constant dose of methadone can perform normally by every standard that relates to employability, and that, except in rare cases, there are no side effects making such a person incapable of being employed. These, of course, are propositions which plaintiffs have consistently espoused. They have been tested in every way that the participants of this trial could think to test them. The overwhelming weight of the evidence is in their support.

Illicit Drug and Alcohol Abuse

A prospective employer of a methadone maintenance patient would naturally question the chances that such a person would revert to heroin, or use other illicit drugs. One aspect of the problem is the possibility that the methadone maintenance patient, unable to find further satisfaction in heroin, might substitute other drugs or alcohol.

The TA contends that there are risks of large proportions among methadone maintenance patients. The TA relies on a study performed by Chambers and Taylor in 1970 to the effect that, in a group of methadone patients in Philadelphia who had been under treatment for at least 24 months, 97.6% of them were found to use an illicit drug at least once during a one-month period. The TA relies on the testimony of Dr. Mitchell S. Rosenthal, director of Phoenix House, which operates a "drug free" program for the treatment of narcotic addicts—*i.e.*, no methadone or other drug is used following the initial detoxification. In the opinion of Dr. Rosenthal, "cheating" by methadone maintenance patients with illicit drugs had been shown by studies to be in the magnitude of 70%. The only specific study Dr. Rosenthal was able to refer to was the one by Chambers and Taylor.

On the other hand, Dr. Rosenthal testified that a patient in a methadone maintenance clinic is monitored so that his use or non-use of drugs can be detected by an employer in a way that does not exist for other employees who might be abusing drugs.

Plaintiffs presented evidence that the conditions under which the Chambers and Taylor study was performed bore no resemblance to the conditions that exist today in a properly conducted methadone maintenance program. Moreover, plaintiffs presented statistics and estimates indicating that the use of illicit drugs among methadone maintenance patients involves a relatively small, and generally visible, minority.

Before going into plaintiffs' evidence on this point, certain observations are necessary. Although fairly detailed information was presented about the major public methadone maintenance programs, very little specific in-

formation was provided regarding the private clinics. Obviously, neither side wished to prolong the case to the extent of subpoenaing witnesses from all, or even some, of the 25 private clinics in New York City. There was general testimony to the effect that the private clinics might tend not to be as well run as the public programs. There was also testimony indicating that the quality and performance of the patients in private clinics might be worse than that of patients in the public programs, although the director of one of the public programs, ARTC, testified that ARTC draws from the hardest of the hard core addicts. The information about the private clinics is not really sufficient to permit a conclusion that statistics about matters such as drug abuse would be either better or worse for the private clinics than for the public programs.

In any event, since the public programs treat about 26,000 out of the 40,000 methadone patients in New York City, statistics and other information drawn from these public clinics cover the majority of methadone maintenance patients in New York City, and will be relied upon with this in view.

The public clinics appear to be conscientious in accumulating information about drug abuse. They also note instances of problem drinking. In the case of drugs, this information comes from the periodic urine tests. With regard to drinking, it appears that the program personnel are trained to be sensitive to signs of such a problem.

The witnesses in this case basically agreed that methadone maintenance patients will sometimes attempt to "challenge" their methadone—*i.e.*, attempt some usage of heroin. This usually happens during the first weeks on a program,

although it can also happen later. Plaintiffs' witnesses were emphatic in their view that these attempts by a person stabilized on methadone to return to heroin fail because of the blockade or cross-tolerance effect. For instance, Dr. Beny J. Primm, Executive Director of ARTC testified:

"... a patient who is on methadone would have no reason whatsoever, once stabilized, to again shoot heroin. I want that absolutely clear. It is just pharmacologically impossible for him to realize any feelings from the heroin because of the cross tolerance of methadone and heroin."

However, this blockade or cross tolerance effect does not relate to drugs other than heroin, or to alcohol.

Dr. Trigg of Beth Israel testified that about 5,000 out of the 6,500-7,000 patients in his clinics have been on methadone maintenance for a year or more. He further testified that 75% of this 5,000 are free from illicit drug use.

Dr. Bihari of the City's methadone maintenance program testified that, for patients who have been in that program more than six months only 4% have signs of heroin usage in urine tests, and 11% have signs of other drugs. Dr. Bihari testified that 6% of the City's patients have alcohol problems.

Dr. Lowinson of the Bronx State Hospital program stated that, for patients who have been in that program six months or more, 6-7% show some evidence of heroin usage in urine tests, and another 12% show evidence of usage of barbiturates or other sedative or hypnotic drugs. Dr. Lowinson testified that 5% of the patients have alcohol problems.

Dr. Primm of ARTC testified that, among his program's patients who have been in treatment a year or more, 60-70% are adjusted sufficiently that they are free from any drug or alcohol problem. Dr. Primm testified that his program's patients are drawn from the "hardest of the hard core" addicts.

Dr. Kreek testified about a study relating to 129 of the first patients in methadone maintenance programs. At the time of the study these patients had been in programs from three to about five years. There was evidence of continued intermittent heroin abuse in the case of 2 out of the 129. There was evidence of intermittent use of other drugs in the case of 6 out of the 129, but these other drugs included barbiturates and valium. Dr. Kreek noted that valium is the second most frequently used drug by the general population—second only to aspirin. There was no indication of any cocaine use among the 129.

I conclude from all the evidence that the strong majority of methadone maintained persons are successful, at least after the initial period of adjustment, in keeping themselves free of the use of heroin, other illicit drugs, and problem drinking.

Employment

There is impressive evidence about successful employment among methadone maintenance patients. Seventy percent of the Beth Israel patients who have been in the program for a "period of time" are employed. Sixty percent of those who have been in the Bronx State Hospital program over a year are employed. In the City program, 45% are employed in paying jobs, 11% are homemakers, and 6% are full-time students. Dr. Primm of ARTC, testi-

fied that 35% of his program's total population (including those in the methadone program and those in a drug free program) are employed. The percentage is greater for the methadone program alone. In the DACC program, 80% are employed.

A statistical study by Dr. Frances Gearing of the Columbia University School of Public Health shows that for four groups of patients studied, the percentage occupied in gainful employment, homemaking, or school attendance after one year were 59%, 63%, 41% and 34% respectively.

Consolidated Edison hires methadone maintenance patients. The policy of Consolidated Edison is to consider for employment a former heroin addict who has performed satisfactorily on a methadone maintenance program for a minimum of one year. Con Ed has hired about 100 former addicts under this policy. Such employees have satisfactorily occupied a variety of positions at Con Ed including monitoring various types of controls, and work on street crews. Con Ed advances such employees along normal promotional lines in accordance with their performance skills, the sole exception being that former addicts are excluded from any nuclear facility in accordance with Con Ed's understanding of the law. Con Ed believes that its experience with former addicts participating in rehabilitation programs has been successful. A special study of the work of 13 Beth Israel patients at Con Ed indicates that their performance was as good or better than that of the average Con Ed employee.

The evidence further indicates that methadone maintenance patients have been satisfactorily employed as sheet metal workers, truck drivers, taxi drivers, drill press operators, teachers, electricians, mechanics, draftsmen, clerks, cashiers, bank tellers, and a great variety of other

positions. Local employers who are now hiring methadone maintenance patients at least on a trial basis are Chemical Bank, New York Life, Metropolitan Life, J. C. Penney, McGraw-Hill, Seagram, Columbia Presbyterian Hospital, New York Telephone Company, New York Off-Track Betting Corporation, and others. An official of the Sheetmetal Workers International Association testified that his organization is bringing methadone maintenance patients into its apprenticeship program, and that they are performing work such as welding, using heavy machinery, and working on scaffolding.

Dr. Joseph testified that there is a large segment of methadone maintenance patients who become "non-visible", in that they are performing well and are free of serious problems. With regard to employment, he testified:

"We have people in methadone maintenance programs who are performing any and every type of service in this city and state, ranging from being outstanding members of the profession to laborers, going through the gamut of electricians—you name it."

According to Dr. Joseph there are thousands of such persons.

Classification of Persons on Methadone Maintenance

There is certain other information in the record which helps give perspective on the question of employability of persons on methadone maintenance.

The witnesses from the Beth Israel program testified that about one-third of the patients in that program, after a short period of adjustment, need very little more than the doses of methadone. The persons in this category

are situated fairly satisfactorily with respect to matters such as family ties, education and jobs. Another one-third of the patients at Beth Israel need a moderate amount of rehabilitation service, including vocational assistance, for a period of several months or about a year. A person in this category may, for instance, have finished high school, but may have a long heroin history and no employment record. A final one-third of the patients at Beth Israel need intensive supportive services, are performing in the program marginally, and either will be discharged or will be on the brink of discharge.

Dr. Harvey Gollance estimated that about 20% of Beth Israel's patients drop out of the program. At the Bronx State Hospital 10% of the patients are discharged during the first year.

Dr. Lukoff from ARTC described it this way. He stated that about one-third of ARTC's patients are "stereotype" addicts, who have started on heroin in their teens, and have had severe problems with family ties, education and crime. The other two-thirds of the ARTC patients are persons who started on heroin in their 20's, who tend to have finished school or military service, and who have maintained better situations with respect to family ties and employment. About 40-45% of the first third drop out in the first year of treatment. About 75-80% of the other two-thirds remain in the program.

The evidence indicates that problem patients—those who are abusing drugs or alcohol and who are not making progress in rehabilitation—are identifiable after about 3-6 months, if not sooner.

On the question of employability—many methadone patients (about 30% in the case of Beth Israel and Bronx State) are employed when they enter the programs. Others

are employed within a matter of weeks. In many cases, however, the clinic personnel feel that they should wait 6-9 months or even a year before making a recommendation for employment.

Identification of Those Employable

As a result of the evidence at the trial, there can be no real dispute about the fact that substantial numbers of methadone maintenance patients are capable of successful employment. The question remains as to how a prospective employer can identify those who will perform satisfactorily, and screen out those who are still abusing drugs or have other undesirable characteristics. There was intensive inquiry on this question at the trial.

My conclusion is that an employer such as the TA can perform this screening for methadone maintenance patients in basically the same way as in the case of other prospective employees.

The TA, like any large employer, has staff and facilities for ascertaining the mental and physical qualifications of prospective employees. The TA also has various systems for monitoring the performance of employees after they are hired. In cases where particular information must be obtained, the TA will consult with physicians, psychiatrists, hospitals, and other sources.

The TA must always make the best determination it can as to whether the applicant will have proper work habits, and whether there is a risk of undesirable conduct such as thievery, drunkenness or narcotic usage. The TA, like any employer, does not rely on hunch, but obtains *objective evidence*—i.e., information about performance at school, employment history, current employment record, family ties, medical or psychiatric history, criminal record, and so forth.

In this connection, it is important to note that the TA has no blanket prohibition against the hiring of persons with criminal records. Individual consideration is given to the nature of the crime, and to the question of how it might relate to the job applied for. For instance, a record of theft would be considered against a person applying to handle money. The prior criminal record would be considered in the context of recent job stability and evidence of rehabilitation.

The TA has no blanket prohibition against the employment of persons taking drugs such as tranquilizers. When evidence of such usage appears, the TA believes it should "dig a little deeper" to find out about the circumstances. Inquiry may be made with the person's doctor. Consideration is given on an individual basis.

The TA has no absolute prohibition against the employment of persons formerly confined to a mental institution or persons who have been, or are currently being, treated by a psychiatrist on retainer to act as consultants where problems such as this arise. But again, the matter of employability is considered on an individual basis.

The TA does not maintain any blanket rule barring the hiring of persons with such medical problems as diabetes, epilepsy or heart disease. Individual consideration is given to applicants having these conditions. It is the policy of the TA to consider the hiring of such persons on an individual basis in light of such factors as their actual performance capabilities and the safety sensitivity of the job to which they seek appointment.

I return to the matter of objective evidence of employability, considered with respect to methadone maintenance patients. A crucial point here is that the record in this case demonstrates that there are large numbers of metha-

done maintenance patients who are able to provide to a prospective employer satisfactory objective evidence of employability. For instance, many methadone maintained persons can demonstrate that they have been on a reliable methadone program for a year or more; that they have faithfully abided by the rules of the program; that, according to systematic tests and observations, they have been free of any illicit drug or alcohol abuse for the entire period of treatment, excluding a possible adjustment period; that they have the necessary education or other training for the job; that they have stable family ties; and that they have a current successful employment record, and a successful work history.

In the background, of course, is the record of heroin addiction. Medical Director Lanzetta of the TA takes the view that when a man goes on heroin there is "some deficiency somewhere", which presumably persists thereafter, particularly while the person needs the "crutch" of methadone maintenance. Although there is no doubt that heroin addiction is a problem of the most severe nature, the presumption that heroin addiction invariably stems from some character defect, making a person more or less permanently unemployable, cannot be supported. The question about whether a person maintained on methadone has some defect or deficiency making him invariably a risky employee has been dealt with in detail heretofore in this opinion. The evidence is conclusively to the contrary.

The question in the individual case is whether the methadone maintenance person, despite the history of heroin addiction, is currently capable of employment. If the TA were being asked to employ a marginal or doubtful case—i.e., a person who had been in a program only a short time and who had no work history or current employment record

—the TA might well be justified in giving little or no consideration to such an applicant. But the TA's blanket exclusionary policy applies with equal strength to the many methadone maintained persons who, from any rational standpoint, have objectively demonstrated their capability of being employed by means of evidence of freedom from drug abuse and employment record. Moreover, the TA's policy applies not only to what are obviously its most sensitive positions—such as subway motormen, subway towermen, bus drivers—but applies to all jobs in the TA, such as clerks and car cleaners. The TA refuses to consider a methadone maintenance person for employment, regardless of the evidence he presents about employability and regardless of what type of job he seeks at the TA.

I have referred a number of times to evidence of freedom from drug or alcohol abuse. The obvious source of such information is the methadone maintenance program.

In connection with obtaining information from methadone maintenance clinics, the TA makes two points: First, that some of the clinics—particularly the private ones—may not provide reliable information; and second, that the clinics may be legally prevented from giving full information to an employer regarding a patient. Neither point is of weight in the present case.

It is true that several of the witnesses indicated that there might be private clinics which could not be relied upon for accurate information about drug and alcohol abuse. Also, one of the witnesses from a "drug free" program expressed skepticism about the ability of one of the public programs—the City program—to consistently provide reliable information. On the latter point, the current director of the City program was thoroughly interrogated in this case, and the weight of the evidence is that the City pro-

gram is soundly managed and reliable within the bounds of normal human fallibility. In any event, the TA has never *tried* to obtain information from even those clinics such as Beth Israel which are unanimously agreed to be reliable. Employers such as Consolidated Edison have found that they can obtain satisfactory information about methadone maintenance patients in order to make intelligent employment judgments. There is no reason to believe that the TA cannot do the same thing.³

With regard to the legal restrictions imposed upon a methadone clinic in the giving out of information about patients, 21 U.S.C. § 1175(a) provides that records of the treatment of any patient in a federally regulated drug abuse prevention function shall be confidential and shall be disclosed only under the circumstances authorized in § 1175(b). Subsections (b)(1) and (g) provide in effect that such records may be disclosed in accordance with the prior written consent of the patient for such purposes as are allowed in regulations issued by the Director of the Special Action Office for Drug Abuse Prevention.

The applicable current regulations were issued June 25, 1975 and became effective on August 1, 1975. 42 C.F.R. §§ 2.1 *et seq.*, 40 Fed.Reg. 27802. Section 2.38 governs disclosure of information to employers. It is clear that under these regulations a methadone maintenance patient may

³ There was some suggestion at the trial that it might be necessary or advisable to have a certification board or panel of experts to determine the employability of former addicts. But the weight of the evidence supports the proposition that an employer such as the TA can make this determination by its normal screening procedures. In the case of methadone maintained persons, the employer would naturally seek information from the program. But this is essentially no different from obtaining relevant references for other types of applicants. If the TA has legitimate doubts about the reliability of the information obtained from the program, it will accord such information little or no weight.

authorize release of information to an employer or prospective employer which is relevant to questions relating to employment.

Persons Having Terminated Methadone Maintenance

The great bulk of the evidence in this case related to the question of the employability of persons engaged in methadone maintenance programs. There was some evidence, although not a great deal, about the characteristics of persons who have successfully *completed* a methadone maintenance program and have withdrawn from methadone.

There are indications that at times these persons will return to the methadone maintenance programs. At times such persons revert to heroin. However, it is unquestioned that there are many methadone maintenance patients who successfully withdraw from methadone and stay clear of drug abuse thereafter. Plaintiff Beazer is such a person, having ceased using methadone almost two years ago.

In any event, it would appear that there would be effective means for objectively determining the qualifications for employment of a former methadone maintenance patient. There is no rational reason for maintaining an absolute bar against the employment of these persons regardless of their individual merits.

Policies of City, State, and Federal Governments

The City of New York, the State of New York and the Federal Government have taken various steps to eliminate bars to public employment of methadone maintenance patients and other former addicts.

On March 22, 1972 the New York City Department of Personnel issued a policy statement approved by various City officials and by the City Civil Service Commission.

The policy statement provided that a history of drug addiction shall not in itself constitute a bar to employment in any City position, except that appointments to the "uniformed services" would continue to be governed by "current medical and physical standards." The policy statement provided that where an applicant for City employment has a history of drug addiction, his case will be considered on its individual merits. The policy statement specifically provided that methadone maintenance patients should be assisted in obtaining City jobs.

This policy has had no effect on the TA, for reasons which will be described hereafter.

As to the exception for the "uniformed services," apparently the police, the firemen, and sanitation workers are included in this category. However, the evidence indicates that in fact there is no blanket exclusion of methadone maintenance patients in these departments at least as to all positions.

The New York State Civil Service Department and Drug Abuse Control Commission have promulgated certain "Operating Principles," providing that if an applicant for State employment has a history of drug abuse, the application should be considered on its merits, although a history of drug abuse may be considered the basis for denial of appointment in "certain sensitive positions" identified by the Civil Service Department. These Operating Principles specifically provide for assistance to methadone maintenance patients seeking State employment.

In 1972 Congress passed the Drug Abuse Office and Treatment Act, which provides in part that "no person may be denied or deprived of Federal civilian employment or a Federal professional or other license or right solely on the ground of prior drug abuse." The statute goes on

to state that this provision does not apply to employment in the CIA, the FBI, or other similar agencies. 21 U.S.C. § 1180(c). Although the statute does not expressly so state, it would appear that a person successfully participating in a methadone maintenance program would be within the protection of the statute.

Mechanics of TA's Exclusion Policy

Positions in the TA consist of so-called "city-wide titles" and also titles which are unique to the TA. The city-wide titles are positions such as secretary, clerk, motor vehicle operator, which involve basically the same work in the TA and in City agencies. The TA has 3,400 employees in city-wide titles.

The New York City Civil Service Commission has adopted medical standards for city-wide titles in the TA, and these standards specify that a person who is successfully participating in a recognized methadone maintenance program may be employed. It is conceded that the TA avoids the effect of this rule by invariably passing over any methadone patient when applicants for city-wide title jobs at the TA are chosen from the Civil Service eligibility lists. The TA has the right under the Civil Service Law § 61 to choose any one of the top three applicants on the list at the time of a particular selection for a job.

With respect to the employment titles at the TA other than city-wide titles, the TA has its own medical standards which it has written, although they have been formally promulgated by the Civil Service Commission. These standards provide that an applicant may be rejected for a history of drug abuse, and it is clear that the TA uniformly rejects all persons with a history of drug abuse who are participating in methadone maintenance programs.

Position in the TA

The TA contends that it cannot afford to take what it considers the risks of employing present or past methadone maintained persons, except possibly those who have been successfully withdrawn from methadone for several years. The TA emphasizes that employees such as subway motormen have an immediate and heavy responsibility for the safety of large numbers of persons. The TA argues that many of its employees must work unsupervised throughout the wide geographical area covered by the TA system. Indeed, the TA's officer in charge of personnel, Wilbur McLaren, testified that "most of our people are literally unsupervised." The TA further contends that its jobs are attended by unusual hazards—such as the risk of a maintenance man being hit by a subway in a tunnel.

There can be little doubt about the unique sensitivity involved in jobs such as that of subway motorman. Despite the existence of various automatic safety devices to protect against the consequences of mistakes, the subway motormen and subway towermen (who control certain subway signals) and other similar employees of the TA must be persons of maximum alertness and competence.

One inevitable question raised by the present case is: "Do you want a methadone patient driving a subway train?" One answer to this question is that, under concededly valid rules of the TA, a person cannot become a subway motorman except by promotion from some other position in the TA. This means that a methadone maintained person seeking his first job with the TA *could not apply* to be a motorman. No one can be considered for the position of motorman until he has demonstrated satisfactory job performance *at the TA* in some other position for a period of a year or eighteen months, or more. The

same is true for the position of subway towerman. As to subway conductors (who control the opening and closing of subway doors), although technically this title is an "entry level" position, in fact the last two competitions for the position—in 1972 and 1975—were open only to existing TA employees seeking promotion. The position of bus driver is open to new applicants. In any event, as I will describe later in this opinion, I believe that it would be constitutionally permissible for the TA to refuse to employ present methadone maintained persons as motormen, conductors, towermen, bus drivers, and in similar operating positions.

But the essential point here is that the TA's exclusionary policy against methadone maintained persons is applied *not merely* with respect to the uniquely sensitive jobs such as motorman and other comparable positions, but is applied with respect to *every* category of work within the TA. It is perfectly clear that large numbers of the employees in the TA perform work essentially similar to the type of work done in other businesses and industries where methadone maintained persons appear to be successfully employed.

The TA (including MABSTOA) employs approximately 47,000 persons. It hires about 3000 employees annually. For various purposes, the TA divides its jobs into operating and non-operating positions. The principal operating positions, with the numbers of persons involved are:

Subway Motormen	3,300
Subway Conductors	3,200
Subway Towermen	600
Bus Operators	5,200
	<hr/>
	12,300

However, the TA has almost 400 other job titles, largely in the non-operating category. The following are a few examples of non-operating titles, listed with the number of employees involved:

Accountant	25
Assistant Accountant	29
Architect	5
Assistant Architect	33
Junior Architect	5
Civil Engineer	79
Civil Engineer Draftsman	27
Assistant Civil Engineer	207
Junior Civil Engineer	58
Cashier	32
Clerk	378
Senior Clerk	286
Collecting Agent	145
Bookkeeping Machine Operator	49
Claim Examiner	60
Computer Operator	7
Keypunch Operator	57
Messenger	12
Railroad Caretaker	229
Railroad Porter	1162
Railroad Stockman	72
Railroad Stock Assistant	103
Railroad Watchman	162
Stenographer	44
Senior Stenographer	48
Typist	190
Senior Typist	33

There are other non-operating TA employees, which will be described in more detail hereafter.

The TA's contention that most of its employees work basically without supervision is somewhat belied by the large number of supervisory positions listed among the approximately 400 titles of TA employment. For instance, there are 21 kinds of foremen. There are a total of 1413 foremen in these 21 categories. There are 40 categories of employment at the TA bearing the title "Senior" attached to type of job—such as Senior Computer Operator, Senior Engineer. There are 12 types of "Superintendents" and 29 types of "Supervisors."

Most of the TA non-operating employees are under some direct supervision, or at least report to a foreman or supervisor who determines that the employees are fit for duty.

All TA employees (except perhaps at the very high levels) are on probation for the first six months of their employment. This applies to both new employees and ones who have been promoted from another TA job. During probation there is close scrutiny by a supervisor.

For various purposes the TA considers certain positions as "critical" or safety-sensitive, and other positions as "non-critical." For instance, periodic physical examinations are given to persons in various critical positions such as subway motormen, subway conductors and bus operators. As will be discussed in more detail hereafter, the TA treats an employee with an alcohol problem differently depending on whether the position is deemed critical or non-critical. Again, the principal critical categories are motormen, conductors and bus operators, although there are non-operating jobs, such as operating cranes and handling high voltage equipment, which are deemed to be critical. A non-critical job is defined by chief personnel officer McLaren, in connection with the alcohol issue, as one where "drinking would not directly relate to passengers' safety or overly ex-

pose other employees." The TA will permit a person having enough of a drinking problem to require treatment by the TA's alcoholic counselling service to remain on non-critical jobs. Such jobs include all the so-called "City-wide" titles (3400 persons); car cleaners (950 persons); and apparently a majority of the jobs involved in repairing subways and buses (total 3000 persons), maintaining subway track, structures and tunnels (total 6800 persons), and manning the subway stations (total 5600 persons).

Certain categories of employment bear further discussion. These are: (1) office work; (2) maintenance of subway cars and buses; (3) maintenance of track, structures and tunnels; (4) work in subway stations.

(1) *Office Work*

The total number of office workers is over 2,000. These include 1200 persons in various clerical and secretarial titles. Most of the office employees work in the two main offices of the TA at 370 Jay Street, Brooklyn, and the World Trade Center in Manhattan. They mainly work a daytime shift and are under normal office-type supervision.

(2) *Maintenance of Subway Cars and Buses*

There are about 6,600 employees involved in the maintenance of subway cars and buses.

This category includes 950 car cleaners.⁴ About half of these do the daily sweeping and picking up of the cars. The

⁴ Apparently this category includes both cleaners of subway cars and cleaners of buses, since there is no separate category of Bus Cleaner given in the list of employment titles furnished to the court. However, plaintiff Frasier applied for the position of "Bus Cleaner" in 1973. It will be assumed that Bus Cleaners perform essentially the same functions as Car Cleaners.

other half do the washing and other type of cleaning which occur on certain schedules. The sweeping and picking up are carried out at the two main subway yards at Coney Island and at 207th Street, and at 13 inspection stations. The washing and other cleaning work is carried out in the two main yards.

Most of the car cleaning is done at night. While some car cleaners work alone, generally they work in groups of two or more and are supervised by a foreman.

One of the objections of the TA to hiring methadone maintained persons for car cleaning is that various cleaning agents are used which might be toxic under certain circumstances, and that the effect of these cleaning agents might be "potentiated" by methadone. Dr. Vincent Lynch testified to this. However, Dr. Lynch admitted that the question of whether there might be some harmful effect depended upon the actual conditions of work at the TA, such as the concentration of the substances and the amount of fresh air ventilation. Dr. Lynch stated that he had tried to find out something about these conditions from the TA, had been unable to do so, and actually knew nothing about the conditions. I therefore can give no weight to the claim about "potentiation" of the effects of cleaning agents.⁵

⁵ The TA has suggested that the cleaning work at the yards involves substantial danger because cleaners need to walk throughout the yards and might encounter third rails carrying 600 volts of electricity. In connection with this case I was taken on a tour of certain parts of the TA system, which included a visit to the Coney Island yard at night. We started at the outskirts of the yard, and crossed seemingly endless numbers of rails and third rails before we finally approached some car cleaning operations. From later testimony, however, it appears that the car cleaners themselves approach their work far more conveniently. After arriving at the yard by subway or automobile, they walk via a parking lot and sidewalk to the foreman's office in the inspection shop, and then to the cars to be cleaned, usually crossing two or three tracks at most.

Another category of positions involves repair and parts replacement for subway cars. There are 3,000 TA employees in this category. These employees perform body work, mechanical and electrical work and painting. They work mainly in shops in the daytime, and generally in groups supervised by foremen.

The TA argues that this subway repair work involves unusual hazards because of the need to manipulate heavy machinery and power tools. But the uncontradicted evidence is that methadone maintained persons are performing successfully in comparable industrial jobs.

In any event, plaintiffs are not suggesting that just anyone on methadone be thrown into working with metal benders and boring machines. The person must be *qualified* for the job. For instance, in the case of Car Maintainer A (Body Work), he would be required under TA regulations to have substantial training and experience in such skills as fabrication of steel assemblies, welding and cutting of heavy gauge metals, forging, and the use of the necessary tools and power equipment. If a present or past methadone maintained person came to the TA and could demonstrate these qualifications, could demonstrate a current satisfactory employment record in this type of work, and could verify his freedom from illicit drugs for a substantial period of time, plaintiffs urge that he deserves to be considered for a job opening on his merits. The evidence supports this proposition.

As to repair of buses, there are about 1000 employees engaged in such work, divided about equally between day and night shifts. The work is mainly done in garages under the supervision of foremen, and is of a somewhat lighter nature than what is involved in the repair of subway cars. However, again there are requirements of extensive training and experience.

As already indicated, the TA deems many of the jobs connected with the repair and maintenance of subways and buses as "non-critical," so that a person with an alcohol problem may be permitted to continue in his job while rehabilitation attempts are being made. Car cleaners are considered non-critical.

(3) *Maintenance of Track, Structures and Tunnels*

This category of work is referred to by the TA as "maintenance of way." There are about 6800 employees involved. These employees lay and repair track, work on road beds, and also do all the other repair and maintenance work for tunnels, stations and elevated rail structures. They maintain the signals and also the equipment for supplying the power to the subway system. These employees include carpenters, masons, plumbers, electricians and metal workers. Also included are the persons who work on drainage pumps and ventilation fans—the type of work done by plaintiff Reyes.

Obviously, the work of these employees is spread throughout the subway system. However, these employees usually work in groups ranging from two or three to larger groups. A foreman will supervise a single group, or several small groups, as appropriate.

Maintenance of Way employees include 1500 trackmen, who work on the rails, ties, plates, ballast and "subgrade." They usually work in gangs of ten men or more under a foreman.

The TA argues that many Maintenance of Way employees are subjected to unique hazards involved in working in tunnels or on elevated structures where trains are passing, and where the third rail must be constantly avoided.

However, here again the TA has set high qualifications for the more sensitive jobs. Positions such as carpenter, mason, signal maintainer, and power distribution maintainer, can only be gained through promotion from helpers or trainees in those categories. A new employee will enter as a helper or trainee, and even the latter are required to have appropriate experience. The helper or trainee will work under close individual supervision for a year or more.

Again, many of the jobs connected with the maintenance of subway track, tunnels and structures are deemed "non-critical," so that a person with an alcohol problem may be permitted to keep working during rehabilitation efforts.

(4) Work in Subway Stations

There are about 5,600 employees involved in this category. They consist mainly of about 4,100 railroad clerks who sell the tokens; about 1,100 railroad porters, who sweep and clean the stations; and about 140 turnstile maintainers, who repair the turnstiles.

These employees work largely alone at the various subway stations throughout the system. However, it is clear that the railroad porter does not occupy a position of unique sensitivity. The TA points out that the railroad clerk and the turnstile maintainer are positions requiring honesty and alertness, and that these employees are sometimes robbed. But the evidence shows that methadone maintained persons are serving as bank tellers, and as cashiers in the Off-Track Betting offices. It is not reasonable to presume that they could *never* qualify for employment as railroad clerks or turnstile maintainers.

Railroad clerks, railroad porters and turnstile maintainers are deemed to be non-critical employees in the application of the policies regarding alcohol.

TA Policy Regarding Alcohol

Some further explanation is necessary regarding the TA's policy about alcohol. The TA's handling of drinking problems is far more lenient than anything suggested in this case regarding methadone maintained persons. Plaintiffs are seeking in this action consideration for employment as to persons whose heroin addiction is *in the past* and who are, at the time they apply to the TA, demonstrably free from drug or alcohol abuse.

Although the TA currently refuses to consider such persons for employment, the TA is willing to continue in employment a substantial number of persons with existing alcohol problems.

A TA employee is subject to discipline if he is found drinking on the job or unfit for duty because of drinking done before he came to work. There was some confusion among the TA witnesses as to exactly what discipline would be imposed. But basically, it appears that, at the time of the first offense, someone in a critical position such as motorman would be moved to a non-critical position such as platform conductor; and a person in a non-critical position would, upon the first offense, be given a three-day suspension and then returned to his job. If the TA believes that the employee has a drinking problem that needs counselling or treatment, he is sent to the TA's Employee Counselling Service, which exists to deal with problem drinkers. He may then be requested to attend Alcoholics Anonymous, or to go to a hospital if necessary. If hospital treatment occurs, an effort is made to have him return to work as soon as possible, because the TA feels "that occupational therapy at the time is a very essential part of their recovery," according to the testimony of Joseph Warren, Director of the Employee Counselling Service.

There are currently about 2300-2400 TA employees attending the counselling service.

As already indicated, persons having drinking problems sufficient to require extended counselling and treatment with the counselling service are permitted to be employed in a wide variety of jobs at the TA including office work, laying of track, cleaning and repair of subway cars, and so forth.

It is interesting to note that a person with a drinking problem may actually be permitted to function in positions such as subway motorman under certain circumstances. If a motorman realizes he has an alcohol problem and comes to the counselling service, or his family reports to the counselling service, he will undertake counselling and treatment on a confidential basis, according to Mr. Warren. This is treated as "highly classified information." The man's supervisor is not apprised, nor apparently is the man taken off the job, until and unless the supervisor detects some failure of performance.

Conclusions of Law

Applicable Law

There is no basic dispute among the parties as to the constitutional doctrines which apply to the present case. A public entity such as the TA cannot bar persons from employment on the basis of criteria which have no rational relation to the demands of the jobs to be performed. To do so is a violation of both the due process and equal protection clauses of the Fourteenth Amendment. This applies to new applicants for employment, and to existing employees threatened with termination.

Decisions dealing with the basic doctrines are *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 94 S.Ct. 791,

39 L.Ed.2d 52 (1974); *Sugarman v. Dougall*, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957); *Baker v. Columbus Municipal Separate School District*, 329 F.Supp. 706 (N.D. Miss. 1971), *aff'd*, 462 F.2d 1112 (5th Cir. 1972).

In the *LaFleur* case the Court held invalid under the due process clause certain rules requiring teachers to take extended leaves of absence beginning with the fourth or fifth month of pregnancy. Justice Stewart, writing for the majority, held that such rules have the effect of creating irrebuttable presumptions of physical inadequacy, and that the constitution requires more individualized determination. Justice Powell concurred in the result, although he disagreed with the irrebuttable presumption theory. Justice Powell would permit certain classifications or rules relating to pregnant teachers, provided they were narrower and rationally related to a legitimate employment purpose.

Sugarman v. Dougall, *supra*, held unconstitutional, as violating the equal protection clause, a provision in the New York Civil Service Law that no person would be eligible for state employment in the "competitive class" if not a United States citizen. Justice Blackmun, writing for the majority, made it clear that the state might, "on the basis of an individualized determination," validly refuse public employment because of noncitizenship in certain types of positions where this factor bore some rational relationship to the demands of the position. However, "a flat ban" on the employment of aliens could not withstand scrutiny under the Fourteenth Amendment.

The Supreme Court's decision in *LaFleur*, *supra*, was anticipated by the Second Circuit decision in *Green v. Waterford Board of Education*, 473 F.2d 629 (2d Cir.

1973). In this case emphasis was laid upon the fact that a pregnant teacher was treated differently from persons having other forms of disability. The court stated (473 F.2d at 634-5):

"Why the Board should choose, by means of an inflexible rule, to manifest particular concern with the health of a pregnant woman, but not, for example, with the health of a teacher (male or female) recuperating from a heart attack is nowhere explained."

Application to the Present Case

Under the above authorities, I hold that the TA's blanket ban against the employment of all present and past methadone maintained persons in *any* position in the TA is a violation of the due process and equal protection clauses of the Fourteenth Amendment.

It is perfectly clear that there are substantial numbers of present or past methadone maintained persons who would be capable of performing many of the jobs at the TA. Individual consideration, or narrower rules rationally related to certain classifications of jobs, are constitutionally required.

The lack of a reasonable basis for the present policy of the TA is particularly evident from the markedly different treatment given to problem drinkers—persons presenting greater risks than those members of the plaintiff class for whom employment is sought. See *Green v. Waterford Board of Education, supra*.

I recognize that there are differences of opinion as to the merits of methadone maintenance as a treatment for heroin addiction. For one thing, there is a conscientious body of opinion strongly objecting on philosophical grounds

to the long-term use of one drug to combat the effects of another drug. However, as plaintiffs' experts point out, one might also challenge on philosophical or moral grounds the use of alcoholic and the use of other "licit" drugs by large segments of the population. Obviously, the constitutional rights of methadone maintained persons cannot be decided on the basis of these considerations.

I wish to stress certain things *not* compelled by my holding. The TA is not required to hire any present or past methadone maintained person where there is a legitimate reason to question the person's ability or competence—including a legitimate reason to believe that the person is abusing illicit drugs or alcohol. The TA is not required to rely on references from methadone clinics or programs where there is reason to doubt the reliability of such information. The TA is not prevented from making reasonable rules and regulations about methadone maintained persons—such as requiring satisfactory performance in a program for a period of time such as a year, or forbidding methadone maintained persons employment in sensitive categories such as that of subway motorman, subway conductor, subway towerman, bus driver, and jobs dealing with high voltage equipment. As in *Sugarman v. Dougall*, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973), the problem is the TA's flat ban, which goes beyond any rational or legitimate needs of the TA, and excludes persons just as qualified for employment as many who are hired by the TA.

One other question to be dealt with at this point relates to the suggestion at the trial that there may be methadone maintained persons who are working for various employers, including the TA, where the employers are unaware of that fact. Surely there is nothing which consti-

tutionally prevents the TA from inquiring of its employees, or applicants for employment, whether they are or were on methadone maintenance programs. Upon such inquiry, the employees or applicants would be obligated to disclose the fact.

Returning to the main issue, I hold that plaintiffs and their class are entitled to relief under the Fourteenth Amendment and under 42 U.S.C. § 1983.

The § 1981 and Title VII Claims

Since I have decided that relief is warranted as described above, I need not reach the claims of racial discrimination under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

The "City" Defendants

Although plaintiffs have shown a right to relief in this case against the TA, MABSTOA, and their officials who have been sued, there is no showing of any wrongdoing or any need for relief as against the New York City Civil Service Commission or the New York City Personnel Department, or any officials connected with these two entities.

Relief to be Granted

In connection with the relief to be granted, there are two subjects to be covered: First, the relief for the named plaintiffs; second, the relief for the class.

With respect to the named plaintiffs, the basic error committed by the TA was determining these persons' status on the basis of the TA's blanket exclusion of present and past methadone maintained persons. The TA will be directed to re-examine the employability of each of the four

named plaintiffs without regard to this invalid policy. The TA will then submit its conclusions to the court. The court will then finally determine whether any of the named plaintiffs should be reinstated or hired, and what rights to back pay there are, if any.

With respect to the class, plaintiffs are directed to submit a proposed permanent injunction based upon the principles announced in this opinion, and the TA defendants are to review and comment upon plaintiffs' proposal.

I have in mind that the injunction cannot provide for the detailed handling of all situations which might arise. Obviously, no one knows at the present juncture exactly who will apply for what job. The injunction should contain certain basic directions and guidelines. Thereafter the court will retain jurisdiction for a period of time to implement the injunction.

APPENDIX D

**Opinion and Judgment of the District Court of the
Southern District of New York, Entered May 5, 1975**

CARL A. BEAZER, *et al.*,

Plaintiffs,

—v.—

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,

Defendants.

No. 72 Civ. 5307.

UNITED STATES DISTRICT COURT, S. D. NEW YORK

May 5, 1976.

Legal Action Center of the City of New York, Inc., New York City, Elizabeth B. DuBois, Eric D. Balber, Mark C. Morril, Michael Meltsner, New York City, for plaintiffs.

Stuart Riedel, Gen. Counsel, New York City Transit Authority, by E. W. Summers, G. T. Dunn, L. Smejda, Brooklyn, N. Y., for defendants.

SUPPLEMENTAL OPINION

GRIESA, *District Judge.*

On August 6, 1975 I filed a decision holding that the New York City Transit Authority and the Manhattan and Bronx Surface Transit Operating Authority (hereafter collectively referred to as "the TA") are committing violations of the

due process and equal protection clauses of the Fourteenth Amendment, and also violations of 42 U.S.C. § 1983, in their blanket refusal to employ any former heroin addicts participating in, or having completed, methadone maintenance programs, regardless of individual merits.

In that decision, I noted the allegation of plaintiffs that the exclusionary policy has a disparate impact on blacks and Hispanics, resulting in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* However, I deemed it unnecessary to reach this racial discrimination claim.

Plaintiffs have received their application for relief under Title VII. Admittedly, the sole purpose of this application is to obtain the benefit of the provision in Title VII authorizing the award of a reasonable attorney's fee to the prevailing party. 42 U.S.C. § 2000e-5(k). In the absence of such express statutory authority the award of fees in the present case could not be made. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975).

It is clear that the question of the attorney's fee deals with a substantial right, and plaintiffs are entitled to an adjudication of their Title VII claim. I hold that the proof establishes a valid cause of action under Title VII, and that plaintiff's attorneys are entitled to the award of a reasonable fee, to be assessed.

The relevant provisions in Title VII prohibiting racial discrimination in employment are contained in 42 U.S.C. 2000e-2(a), which provides:

"(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any indi-

vidual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

The cases hold that Title VII does not require proof of a purpose or intent to carry out racial discrimination. *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). It is sufficient to prove that an employer has adopted a test or criterion for employment which in fact operates in a racially discriminatory manner against minority races, where that criterion is not shown to be related to job performance. *Id.* at 431. See *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971).

I have already held in my earlier opinion that the blanket exclusionary policy of the TA against present and former methadone maintenance patients is not rationally related to any employment or business needs of the TA. This leaves for determination, under the Title VII claim, the question of whether the policy of the TA has a racially discriminatory effect against blacks and Hispanics.

The four named plaintiffs are members of minority races or national groups. Two are blacks and two are Hispanics. Of the TA employees referred to the TA's medical consultant for suspected violation of its drug policy since July 1972, 81% were black and Hispanics and only 19% were white.

Plaintiffs place their greatest reliance on the argument that, although the policy of the TA is racially neutral on its face (dealing solely with problems of drug addiction and treatment), the impact of the policy will tend inevitably to exclude more blacks and Hispanics from TA employment, because of the admitted fact that the class of present and former methadone maintained persons includes substantially more blacks and Hispanics than whites.

Between 62% and 65% of methadone maintained persons in New York City are black and Hispanic, meaning that there are almost twice as many blacks and Hispanics as there are whites in this category. Thus the policy of the TA, while not adopted with a purpose of racial discrimination, has been shown to have a substantially greater impact on minority groups than on whites. Since the policy is not grounded in any business necessity, it violates Title VII. *Griggs v. Duke Power Co.*, 401 U.S. at 430 n.6, 91 S.Ct. 849; *Green v. Missouri Pacific R.R.*, 523 F.2d 1290, 1293-95 (8th Cir. 1975); *United States v. Georgia Power Co.*, 474 F.2d 906, 918 (5th Cir. 1973); *Gregory v. Litton Sys.*, 316 F.Supp. 401, 403 (C.D.Cal. 1970), *aff'd*, 472 F.2d 631 (9th Cir. 1972). The fact that other policies of the TA apparently have resulted in a liberal amount of employment for minorities by the TA is not a defense with respect to the exclusionary policy under scrutiny in this case. *Davis v. Washington*, 168 U.S.App.D.C. 42, 512 F.2d 956, 960-61 and n.31 (1975), *cert. granted*, 423 U.S. 820, 96 S.Ct. 33, 46 L.Ed. 2d 37 (1975), *United States v. Jacksonville Terminal Co.*, 451 F.2d 418, 443 (5th Cir. 1971) *cert. denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972).

In a Title VII case, attorney's fees are normally awarded to the prevailing party, unless there are exceptional circumstances indicating that such an award should

not be made. No such circumstances exist in the present case. Plaintiffs are clearly entitled to a fee award. *Lea v. Cone Mills Corp.*, 438 F.2d 86, 88 (4th Cir. 1971); *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970). See *Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 240, 261-62, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975); *Alexander v. Gardner Denver Co.*, 415 U.S. 36, 47, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974); *Northcross v. Board of Educ.*, 412 U.S. 427, 93 S.Ct. 2201, 37 L.Ed.2d 48 (1973); *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968); *Fort v. White*, 530 F.2d 1113 (2d Cir. 1976).

A hearing will be held on the amount of the award.

So ordered.

APPENDIX E

Amended Permanent Injunction and Judgment of the District Court of the Southern District of New York, Entered January 24, 1977

72 Civ. 5307 (T.P.G.)

CARL A. BEAZER, *et al.*,

Plaintiffs,

—against—

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,

Defendants.

AMENDED PERMANENT INJUNCTION AND JUDGMENT

WHEREAS,

(1) on May 20, 1976, this Court entered a Permanent Injunction and Judgment against defendants New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority, and certain related defendants (hereinafter referred to as the "TA"), paragraphs 4 and 5 of which Order contemplated further action by this Court; and

(2) on September 24, 1976, plaintiffs moved this Court for an order modifying the May 20, 1976 Order; and

(3) on May 5, 1976, this Court declared that plaintiffs were entitled to the award of a reasonable attorneys' fee pursuant to Title VII of the 1964 Civil Rights Act; and

(4) on October 29, 1976, plaintiffs moved this Court for an order declaring defendants' liability for attorneys' fees pursuant to the Civil Rights Attorneys' Fee Award Act of 1976 and fixing the amount of fees;

ACCORDINGLY, this Court having considered all papers and proceedings had herein relating to the above mentioned motions and having held hearings on January 11, 13 and 21, 1977 to consider these matters and having made findings on the record at these hearings, that

(1) plaintiffs Francisco Diaz and Malcolm K. Frasier are entitled to individual relief; and

(2) plaintiffs Carl A. Beazer and Jose Reyes and class member Nathaniel Wright are not entitled to relief; and

(3) plaintiffs are entitled to the award of a reasonable attorneys' fee.

IT IS HEREBY ORDERED that the decretal provisions of the Permanent Injunction and Judgment, as amended, shall read as follows:

1. Except as specified in Paragraphs 2 and 3, the TA, its members, directors, officers, agents and employees, are permanently enjoined and restrained from denying employment to, or dismissing from employment, any person solely because of present or past participation in methadone maintenance treatment.

2. Except as specified in Paragraph 3, the employability of present or past methadone maintained persons (in all phases of the employment process, including new applications, promotions, transfers, disciplinary proceedings and dismissals) shall be considered by the TA according to ap-

propriate personnel procedures to determine the suitability of the individual for the particular job. In the case of a present or past methadone maintained person, the TA is entitled to take in consideration all relevant factors about the person's drug history, and the quality and reliability of any methadone maintenance program having treated the person, in determining the person's suitability for the job.

3. This injunction does not prevent the TA from using appropriate standards regarding the employability of present or past methadone maintained persons, such as:

(a) A requirement of satisfactory performance in a methadone maintenance program for a specified period, such as a year, as a condition for employment;

(b) A restriction against employment of such persons in sensitive categories such as subway motorman, subway conductor, subway towerman, bus driver, and positions dealing with high voltage equipment.

4. As soon as an appropriate position becomes available, the named plaintiff Francisco Diaz shall be hired by the TA as a Maintainer's Helper Group (D), or in an equivalent position, with back pay and seniority rights from January 1, 1973. The TA shall not be entitled to use the provisions of New York City Civil Service Law §61 (the "one in three" rule) to deny employment to plaintiff Diaz. The amount of back pay received by plaintiff Diaz shall be offset by the amount actually earned from other employment and unemployment benefits.

5. As soon as an appropriate position becomes available, the named plaintiff Malcolm K. Frasier shall be hired by the TA as a Bus Cleaner, or in an equivalent position, with back

pay and seniority rights to which he would have been entitled if he had not been initially rejected for employment as a Bus Cleaner. The TA shall not be entitled to use the provisions of New York Civil Service Law §61 (the "one in three" rule) or any other device to deny employment to plaintiff Frasier. The amount of back pay received by plaintiff Frasier shall be offset by the amount actually earned from other employment and unemployment benefits.

6. All persons who have resigned, been dismissed from or denied TA employment due to present or past participation in methadone maintenance treatment shall be eligible for reexamination for TA employment under the terms of this injunction, and shall be given notice to that effect, pursuant to the following procedure:

(a) Counsel for plaintiffs shall submit for the Court's approval an appropriate list of persons to be given notice, and the text of a proposed notice. The notice shall indicate that a decree has been entered giving relief to plaintiffs' class and shall state that persons who believe they may be entitled to relief under the decree may contact plaintiffs' counsel;

(b) After said list and notice are approved by the Court, the TA shall within one week provide plaintiffs' counsel with the latest, most complete address in its possession for each person on the list and plaintiffs shall promptly mail said notice to all persons appearing on said list;

(c) Plaintiffs' counsel shall submit to the TA the names and addresses of those persons who respond to said notice, or who otherwise contact plaintiffs' counsel, as to whom plaintiffs' counsel believe that they have a *bona fide* claim to be members of plaintiffs' class;

(d) With respect to persons whose names are submitted to the TA pursuant to subparagraph (c) *supra* the TA shall, within sixty (60) days of said submission, reexamine said persons to determine their employability pursuant to the terms of this injunction and shall submit a report regarding same to the Court and to counsel for plaintiffs. After the reports required by this subparagraph are submitted the Court shall take appropriate action.

7. The provisions of ¶6 *supra*, shall not be to the prejudice of the right of persons claiming to be members of plaintiffs' class to independently notify the TA of their desire to be reexamined for TA employment pursuant to the terms of this injunction. Such persons shall be reexamined as though they were persons whose names had been submitted to the TA pursuant to ¶6 *supra*, and shall be afforded the same rights given said persons.

8. Fees in the amount of \$360,710 and costs and disbursements in the amount of \$14,290 shall be paid by the Transit Authority to the Legal Action Center of the City of New York, Inc.

9. The action is hereby dismissed as to plaintiffs Carl A. Beazer and Jose Reyes, and class member Nathaniel Wright, and as to the Civil Service Commission of the City of New York, the Personnel Department of the City of New York, Harry T. Bronstein, Chairman of the Civil Service Commission and Director of the Personnel Department, and David Stadtmauer and James W. Smith, members of the Civil Service Commission and their successors in office, without costs.

10. This Court reserves and retains jurisdiction herein for the purpose of construing or enforcing this order, awarding further plaintiffs' costs and attorneys' fees, if appropriate, and granting any other further relief that may be necessary.

/s/ THOMAS P. GRIESA
 Thomas P. Griesa
U.S.D.J.

Dated: New York, New York
 January 24, 1977

APPENDIX F

Civil Rights Act of 1871, April 20, 1871, c. 22 (R.S. 1979): 28 USC § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. § 1979.

APPENDIX G

**Civil Rights Act of 1964, Pub. L. 88-352, July 2, 1964,
78 Stat. 241: Title VII, 42 USC § 2000e**

SUBCHAPTER VI.—EQUAL EMPLOYMENT OPPORTUNITIES

§ 2000e. Definitions

For the purposes of this subchapter—

(a) The term “person” includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The terms “employer” means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five

employees (and their agents) shall not be considered employers.

(c) The term “employment agency” means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term “labor organization” means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or

an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospec-

tive employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Pub. L. 88-352, Title VII, § 701, July 2, 1964, 78 Stat. 253; Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 662; Pub. L. 92-261, § 2, Mar. 24, 1972, 86 Stat. 103.

§ 2000e-1. Subchapter not applicable to employment of aliens outside State and individuals for performance of activities of religious corporations, associations, educational institutions, or societies

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Pub.L. 88-352, Title VII, § 702, July 2, 1964, 78 Stat. 255; Pub.L. 92-261, § 3, Mar. 24, 1972, 86 Stat. 103.

§ 2000e-2. Unlawful employment practices—Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Employment agency practices

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

Labor organization practices

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Training programs

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning

is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Members of Communist Party or Communist-action or Communist-front organizations

(f) As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

National security

(g) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is

subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

Businesses or enterprises extending preferential treatment to Indians

(i) Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

Preferential treatment not to be granted on account of existing number or percentage imbalance

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255;
Pub.L. 92-261, § 8(a), (b), Mar. 24, 1972, 86 Stat. 109.

APPENDIX H

**Civil Rights Attorney's Fees Awards Act of 1976,
Pub. L. 94-559, October 19, 1976,
90 Stat. 2641, 42 USC § 1988**

§ 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

As amended Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641.

APPENDIX I

**Fourteenth Amendment, Section 1, of the
Constitution of the United States**

**AMENDMENT XIV. — CITIZENSHIP; PRIVILEGES
AND IMMUNITIES; DUE PROCESS; EQUAL PRO-
TECTION;**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX J

New York Public Authorities Law, Article 5, Title 9, §§ 1201, 1202, 1203

§ 1201. New York city transit authority

1. A board, to be known as "New York City Transit Authority" is hereby created. Such board shall be a body corporate and politic constituting a public benefit corporation. It shall consist of nine members, all serving ex officio. Those members shall be the persons who from time to time shall hold the offices of chairman and members of metropolitan transportation authority.

2. The chairman of such board shall be the chairman of metropolitan transportation authority, serving ex officio. He shall be the chief executive officer of the authority and shall be responsible for the discharge of the executive and administrative functions and powers of the authority, but he shall be empowered to delegate any one or more of such functions or powers, including, without limitation, that of appointment, discipline and removal of officers and employees, to one or more executive officers appointed by the board.

3. The chairman and other members of the board shall not be entitled to compensation for their services but shall be entitled to reimbursement for their actual and necessary expenses incurred in the performance of their official duties.

4. Notwithstanding any inconsistent provisions of this or any other law, general, special or local, no officer or employee of the state or any public corporation, as defined

in the general corporation law,¹ shall be deemed to have forfeited or shall forfeit his office or employment or any benefits provided under the retirement and social security law or under any public retirement system maintained by the state or any of its subdivisions by reason of his being a member or the chairman of the authority.

5. A majority of the whole number of members of the authority then in office shall constitute a quorum for the transaction of any business or the exercise of any power of the authority. Except as otherwise specified in this title, for the transaction of any business or the exercise of any power of the authority, the authority shall have the power to act by a majority of the members present at any meeting at which a quorum is in attendance.

Formerly § 1801, added L.1955, c. 579, § 1; amended L.1956, c. 504; L.1957, c. 547, § 3; L.1957, c. 714; renumbered 1201, L.1957, c. 914, § 3; amended L.1964, c. 431; L.1967, c. 717, § 70, eff. March 1, 1968.

§ 1202. Purposes of the authority

1. The purposes of the authority shall be the acquisition of the transit facilities operated by the board of transportation of the city and the operation of transit facilities in accordance with the provisions of this title for the convenience and safety of the public on a basis which will enable the operations thereof, exclusive of capital costs, to be self-sustaining.

2. It is hereby found and declared that such purposes are in all respects for the benefit of the people of the state of New York and the authority shall be regarded as

¹ See General Corporation Law § 3.

performing a governmental function in carrying out its corporate purpose and in exercising the powers granted by this title.

Formerly § 1802, added L.1953, c. 200; renumbered 1202, L.1957, c. 914, § 3, eff. April 24, 1957.

§ 1203. Transfer of transit facilities by the city to the authority

1. a. On or before June first, nineteen hundred fifty-three, the city may, by resolution of the board of estimate or by instruments authorized by any such resolution, enter into an agreement with the authority for the transfer to the authority, for use in the execution of its corporate purposes, of the transit facilities now owned or hereafter acquired or constructed by the city and any other materials, supplies and property incidental to or necessary for the operation thereof. Any such agreement shall provide for transfer of such facilities by deed, lease, license or other arrangement, provided the term thereof shall not be less than ten years and authorize the authority to take jurisdiction, control, possession and supervision of such transit facilities, materials, supplies and property on or before June fifteenth, nineteen hundred fifty-three.

b. (i) Such agreement shall provide that capital costs of a nature not heretofore charged as operating expenses shall be paid by the city, or at the option of the authority may be paid in the first instance by the authority but in such event, the authority shall be entitled to recover from the city the amount of such costs; provided, however, that the total amount of such capital costs which the authority may incur without the approval of the mayor in any fiscal year shall not exceed five million dollars and that no other

such capital costs shall be incurred by the authority without such approval. Where the city is required to reimburse the authority for the amount of any capital costs pursuant to such agreement, serial bonds or capital notes may be issued by the city, pursuant to the local finance law, to finance any such reimbursement in the same manner and to the same extent as if such costs were to be paid directly by the city.

The authority shall submit annually to the city planning commission and the mayor of the city on or before October fifteenth in each year an estimate of all such capital costs for inclusion in the capital budget of the city.

(ii) From and after March first, nineteen hundred sixty-eight, the authority shall also have the right to incur capital costs of such nature in its own name to the extent that capital funds are available to it for expenditures of such nature pursuant to the provisions of section twelve hundred nineteen-a of this chapter or of any other provision of law, which capital costs shall not be payable by the city; provided, however, that no project to be financed by the use of such capital funds which is estimated by the authority to involve an expenditure in excess of one million dollars shall be commenced unless the mayor and the board of estimate shall each have been notified in writing by the authority of the intent of the authority to undertake such project and the nature thereof. No such project shall be commenced if and to the extent that either the mayor or a majority in voting power of the members of the board of estimate shall find that it is incompatible with sound planning for the development or redevelopment of the city, provided such finding, together with the reasons therefor, is set forth in a writing delivered to the authority within thirty days of the receipt by the mayor or the board of

estimate, as the case may be, of the notification of the authority relating to such project. If any such project is not so disapproved, it may nevertheless not be commenced unless and until the city shall have been given an opportunity to include the same in the capital budget of the city for the first fiscal year of the city commencing not less than six months after receipt of such notification. If and to the extent that such project is included in such capital budget, the authority may not thereafter incur capital costs for the same in its own name. If or to the extent such project is not included in such capital budget, the authority may incur capital costs for the same in its own name. The operation of sections twenty, twenty-one and twenty-two of the rapid transit law shall be suspended with respect to any project financed with the capital funds referred to in this subparagraph.

c. Such agreement shall provide that the authority shall have the use and possession of all property owned or leased by the city and used or occupied by the board of transportation on March fifteenth, nineteen hundred fifty-three in connection with or incidental to the operation of such transit facilities.

d. No provision in such agreement shall purport to limit or restrict or have the effect of limiting or restricting, the power granted the authority to manage, control or direct the maintenance and operation of such transit facilities or the fares or service thereof.

2. Such agreement shall provide for payment by the city of:

a. Capital costs for projects connected with such transit facilities included in the capital budget of the city for periods prior to December thirty-first, nineteen hundred

fifty-three, except that the authority shall not require payment of, and the city shall not pay, capital costs of such projects without prior approval of the board of estimate.

b. Liabilities of the city or the board of transportation for:

(1) Pension or retirement contributions on behalf of persons who were employed on transit facilities heretofore acquired by the city.

(2) Contributions to the New York City employees' retirement system on behalf of officers or employees whose compensation has been paid out of the operating revenues of the board of transportation of the city, which contributions have or shall hereafter become due or payable for fiscal years of the city ending on or before June thirtieth, nineteen hundred fifty-three.

c. All other liabilities of the board of transportation on the date of the conveyance.

d. Ten million dollars derived from any funds of the city (but not from borrowed funds), or from the operating fund of the board of transportation at the time of such transfer, for use by the authority as initial working capital (1) in partial consideration of the acceptance by the authority of the initial transfer, in which case the sum shall not be repaid, or (2) as a loan, in which case such sum shall be repaid in not less than five nor more than ten equal annual installments, commencing July first, nineteen hundred fifty-four.

3. a. Such agreement may contain provisions relating to the use and occupancy by the authority of real property (in addition to that transferred pursuant to subdivision

one of this section) now or hereafter owned or leased by the city, on such terms as may be mutually agreed upon by the city and the authority, and may provide for or authorize surrenders to the city of property no longer required by the authority.

b. The authority shall be entitled to utilize the officers, employees, agents, facilities and services of the city on the same terms and conditions as were applicable to or provided to the board of transportation on March fifteenth, nineteen hundred fifty-three.

4. The city and the authority are hereby authorized and empowered to make or enter into any contracts, agreements, deeds, leases, conveyances or other instruments as may be necessary or appropriate to effectuate the purposes of this title and they shall have complete power and authority to do and to authorize the doing of all things, incidental, desirable or necessary to implement the provisions of this section.

5. Upon the filing by the authority with the clerk of the city and the secretary of state of a copy of the instruments or documents effectuating the transfer, the authority shall take possession and control of the transit facilities and other property transferred thereby together with all contracts, books, maps, plans, papers and records of or in the possession of the board of transportation of whatever description, incidental to or necessary for the operation of the facilities transferred by such agreement or the performance of the duties of the authority as provided by this title.

6. When in the discretion of the authority there is available a supply of electric power adequate for the efficient and proper operation of the transit facilities either from a

private utility or otherwise at rates and under circumstances deemed by the authority to be reasonable, the authority may make such provisions for the utilization of such electric power as it may see fit and surrender to the city the power plants presently leased by the authority from the city pursuant to the provisions of this title. The foregoing provisions of this subdivision shall be applicable only to action of the authority undertaken prior to February first, nineteen hundred and sixty.

7. Notwithstanding the aforesaid provisions of this section, the city may transfer to the authority title and ownership to the materials, supplies and property incidental to or necessary for the operation of the transit facilities which were heretofore leased to the authority, and the authority and the city may enter into an agreement, modifying the agreement of lease dated June first, nineteen hundred fifty-three, as amended, renewed and supplemented, to provide for such transfer of title and ownership and containing such further terms and conditions, not inconsistent with the law, as may be agreed upon between the parties. Formerly § 1803, added L.1953, c. 200; amended, L.1953, c. 201, §§ 4, 5; L.1953, c. 880, §§ 1, 2; renumbered 1203, L.1957, c. 914, § 3; amended L.1959, c. 857, § 2; L.1964, c. 513, § 1; L.1964, c. 576, § 68; L.1967, c. 717, § 71, eff. March 1, 1968.

APPENDIX K

**Order of The United States Court of Appeals,
Second Circuit, Granting Petitioner's Motion for a
Stay of Issuance of Mandate**

**UNITED STATES COURT OF APPEALS
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals,
in and for the Second Circuit, held at the United States
Court House, in the City of New York, on the 10th day of
March, one thousand nine hundred and seventy-eighth.

CARL A. BEAZER, JOSE R. REYES, FRANCISCO DIAZ, individually
and on behalf of all others similarly situated, MACOLM
K. FRASIER,

Plaintiffs-Appellees-Appellants,

—v.—

NEW YORK TRANSIT AUTHORITY, WILLIAM J. RONAN, indi-
vidually and in his capacity as a member and as Chair-
man and Chief Executive Officer of the New York City
Transit Authority, *et al.*,

Defendants-Appellants-Appellees.

It is hereby ordered that the motion made herein by coun-
sel for the appellants cross-appellees New York City Tran-
sit Authority by notice of motion dated February 15, 1978

to stay issuance of the mandate pending application to the
Supreme Court of the United States for a writ of certiorari.
be and it hereby is granted.

/s/ WALTER R. MANSFIELD
(per EA)

Walter R. Mansfield

/s/ JAMES L. OAKES
James L. Oakes

/s/ CHARLES BRIEANT
(USDJ by Desig.)

Charles Brieant

Circuit Judges

APPENDIX

IN THE
Supreme Court of the United States
October Term, 1978
No. 77-1427

THE NEW YORK CITY TRANSIT AUTHORITY, *et al.*,
Petitioners,

—v.—

CARL BEAZER, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 6, 1978
CERTIORARI GRANTED JUNE 26, 1978

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NOTE: Relevant opinions, judgments and orders are to be
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ary 1, 1978 9a

APPENDIX C

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Amended Permanent Injunction
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1977 75a

APPENDIX K

Order of the United States Court
of Appeals, Second Circuit,
granting petitioner's motion for
a stay of issuance of mandate102a

Docket Entries

UNITED STATES DISTRICT COURT

72 Civ. 5307

DATE	PROCEEDINGS
12-15-72	Filed complaint & issued summons.
1-10-73	Filed stip & order that time of deft's as indi- cated to answer the, complaint is ext. to 2-9-73. So ordered. Griesa, J.
2-13-73	Filed plttf's affidavit & notice of motion ret. be- fore Griesa, J. on 2-21-73 for class suit deter- mination.
2-13-73	Filed plttf's memorandum of law in support of their motion ret. 2-21-73.
2-23-73	Filed stip & order adj. plttf's motion for a class action ret, 2-21-73, to 4-10-73. So ordered. Griesa, J.
2-23-73	Filed stip & order that plttf's motion for a class action & deft's, motion for dismissal & sum- mary judg. ret. 2-27-73 adj. to 4-10-73. So ordered. Griesa, J.
2-26-73	Filed Summons with Marshal's returns: Served: New York City Transit Authority on 12-20- 72 Wilbur B. McLaren on 12-20-72 Mortimer Gleeson on 12-21-72 Justine N. Feldman on 12-21-72 Donald H. Elliott on 12-21-72 Frederic B. Powers on 12-30-72 William L. Butcher on 1-2-73 Eben W. Pyne on 1-6-73 Harold L. Fisher on 1-9-73

Docket Entries

DATE	PROCEEDINGS
	Leonard Braun on 1-15-73
	Department of Personnel of the City of New York on 1-18-73
	Civil Service Commission of the City of New York on 1-18-73
	David Stadtmauer on 1-30-73
	William A. Shea on 2-6-73
	Louis Lanzetta on 2-8-73
	Harry I. Bronstein on 2-8-73
	William J. Ronan on 2-8-73
	Lawrence R. Bailey on 2-12-73
	James W. Smith on 2-13-73
3-21-73	Filed Deft's Answer to the complaint,
5-3-73	Filed Memo-End. on motion dtd 2-13-73. Motion granted. The prerequisites of treatment under FRCP 23(b)(2) are met, as far as the present record shows. There is no opposition to the motion. Griesa, J. (mn)
5-3-73	Filed deft N.Y.C. Transit Authority etc. notice of motion ret: 2-27-73 re: dismissal etc.
5-3-73	Filed Memo-End. on motion to dismiss dtd this date. This motion to dismiss the complaint and for summary judgment is denied. There are sufficient allegations in the complaint to indicate the existence of factual issues for trial, at least as far as the present record shows. Griesa, J. (mn)
5-3-73	Filed Order To Show Cause for leave to appear amicus curiae ret: 4-18-73.

Docket Entries

DATE	PROCEEDINGS
5-3-73	Filed Memo-End. on order to show cause. Motion granted. Griesa, J. (mn)
5-31-73	Filed copy of deft's. NYC Transit Authority, et al Answer to complaint.
6-22-73	Filed plttfs interrogatories addressed to certain defts, and request for the production of documents.
6-29-73	Plttfs Interrogatories addressed to Lawrence R. Bailey.
6-29-73	Filed plttfs Interrogatories addressed to deft. Leonard Braun & request for documents.
6-29-73	Filed plttfs Interrogatories addressed to deft. William A. Shea & request for documents.
6-29-73	Filed plttfs Interrogatories addressed to deft. Donald H. Elliott & request for documents.
6-29-73	Filed plttfs Interrogatories addressed to deft. M. Gleeson & request for documents.
6-29-73	Filed plttfs request for production of documents & Interrogatories addressed to William L. Butcher.
6-29-73	Filed plttfs Interrogatories addressed to deft. Frederic B. Powers & request for documents.
6-29-73	Filed Plttfs Interrogatories addressed to the deft. J.N. Feldman & request for documents.
6-29-73	Filed plttfs Interrogatories addressed to the deft. E.W. Pyne & request for the production of documents.

Docket Entries

DATE	PROCEEDINGS
6-29-73	Filed plttfs Interrogatories addressed to the deft. W.J. Ronan & request for documents.
7-2-73	Filed plttfs Interrogatories addressed to the deft. H.I. Bronstein & David Stad and James W. Smith & request for the production of documents.
7-5-73	Filed affidavit of service by John Maldonado for the plttf.
7-5-73	Filed defts affidavit of service by Elizabeth B. DuBois.
7-9-73	Filed change of address of Legal Action Center. (See front Sheet)
9-25-73	Filed affdvt. of Gilbert T. Dunn in opposition to plttfs' motion to amend & supplement pleadings, to add a party plttf.
9-25-73	Filed memorandum in support of plttfs' motion to amend & supplement pleadings.
9-25-73	Filed plttfs' affdvt. & notice of motion to amend pleadings and to add party plttf-ret. 7-23-73.
9-25-73	Filed memo endorsed on motion filed 9-25-73—Motion to amend pleadings & to add party plttf. granted—So ordered—Griesa, J.—mailed notice.
10-26-73	Filed defts' answers to plttfs' interrogs.
10-26-73	Filed defts' interrogs. and request for production of documents.

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DATE	PROCEEDINGS
10-30-73	Filed affdvt. of Eric D. Balber in support of plttfs' motion to amend pleadings.
10-30-73	Filed memorandum in support of plttfs' motion to amend the pleadings.
10-30-73	Filed memo endorsed on affdvt. filed 10-30-73—There being no opposition, the motion is granted. Plttfs. are to file and serve their amended complaint within ten days—So ordered—Griesa, J.—m.n.
10-31-73	Filed plttf's affdvt. & show cause order for a temporary restraining order and a preliminary injunction—ret. 10-29-73—Griesa, J.
10-31-73	Filed memo endorsed on show cause order filed 10-31-73—Action on motion deferred as per minutes of hearing 10-29-73—Smith withdraws application insofar as directed to preventing hearing of 10-31-73 and obtaining immediate reinstatement of back pay. Smith is to be given one week's notice before any dismissal goes into effect.—So ordered—Griesa, J.—mailed notice.
11-9-73	Filed defts' answers to interrogs.
11-9-73	Filed order that the Beth Israel Methadone Maintenance Treatment Program, et al produce at the offices of counsel for plttfs. all methadone maintenance treatment program or other medical records in their custody—said photocopies are to be conveyed within 3 business days of the receipt of said records by plttfs' counsel

Docket Entries

DATE	PROCEEDINGS
	unless objections to their conveyance have been submitted to the Court within that time period —Griesa, J.—mailed notice.
11-20-73	Filed transcript of record of proceedings of 10-29-73—Griesa, J.
11-27-73	Filed deft's (Ronan) answers to interrogs.
11-30-73	Filed defts. Answers to pltf's interrogatories, First Supplement.
11-30-73	Filed Answers of Defts. N.Y.C. Transit Authority, et al to amended complaint.
12-5-73	Filed defts. N.Y.C. Transit Authority, notice of deposition of U.S. Veterans Administration. Methadone Maintenance Program.
12-5-73	Filed defts. N.Y.C. Transit Authority, notice of deposition of Methadone Maintenance Treatment Center.
12-5-73	Filed defts. N.Y.C. Transit Authority, notice of deposition of Beth Israel Methadone Maintenance Treatment Program.
12-27-73	Filed notice of deposition and request for production of documents by pltf. Testimony of Louis Lanzetta.
12-27-73	Filed pltf. notice of deposition and request for production of documents, of William J. Ronan.
12-27-73	Filed pltf. notice of deposition of Justin Feldman; and request for production of documents.

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DATE	PROCEEDINGS
12-27-73	Filed pltf. notice of deposition of Lawrence Bailey, and request for production of documents.
12-27-73	Filed pltf. notice of deposition of New York City Transit, and request for production of documents.
12-27-73	Filed pltf. notice of deposition of Wilbur McLaren, and request for production of documents.
12-27-73	Filed pltf. notice of deposition of Leonard Braun, and request for production of documents.
12-27-73	Filed affdvt. of service of notice of deposition.
1-4-74	Filed pltf. notice of deposition of William Butcher, and request for production of documents.
1-14-74	Filed order amending order dated 11-8-73 so as to include any and all records in the custody of Morris J. Bernstein Institute and any other hospital, institution or methadone maintenance treatment program re: Carl A. Beazer, Francisco Diaz, Jose R. Reyes, Malcolm Frasier or Vannie A. Smith aka Alfred E. Costello—Griesa, J.—mailed notice.
1-18-74	Filed pltf's' affdvt. & show cause order re: transcripts of all depositions, etc. ret. 1-21-74, at 1:00 P.M.
1-18-74	Filed stip. & order that all methadone maintenance treatment program or other medical records, may be used solely for the purpose of

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	defending the action—that said records are otherwise absolutely confidential and may not, be disclosed by defts. to any persons not parties to the action—Griesa, J.
1-22-74	Filed order that the depositions to be taken by defts. may not be used for any criminal investigation or prosecution of said persons; that the transcripts of said depositions are to be sealed except and until otherwise ordered by this Court; and that the only persons to be present at said depositions are to be parties to this action, their counsel, and stenographic personnel—Griesa, J.—m.n.
1-25-74	Filed affdvt. of service by an individual of show cause order.
2-5-74	Filed affdvt. of Malcolm Frasier re: answers to interogs.
3-15-74	Filed plttfs' notice of taking deposition of Harold L. Trigg, M.C. & request for productions of documents.
3-25-74	Filed plttfs' notice of taking deposition of Harold Shannon.
3-28-74	Filed plttfs' notice to take deposition.
4-3-74	Filed plttfs' affdvt. & show cause order directing Harold L. Trigg to answer oral interogs.—ret. 4-4-74.
4-3-74	Filed plttfs' memorandum of law in support of motion.

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DATE	PROCEEDINGS
4-5-74	Filed memo endorsed on plttfs' show cause order filed 4-3-74—Motion granted in part and denied in part. See minutes of 4-4-74—So ordered—Griesa, J.—m.n.
5-8-74	Filed plttfs notice to take deposition of Wm. J. Ronan, & request for production of documents.
5-8-74	Filed plttfs notice to take deposition of L. R. Bailey, & request for production of documents.
5-8-74	Filed plttfs notice to take deposition of Leonard Braun, & request for production of documents.
5-8-74	Filed plttfs notice to take deposition of Justin N. Feldman, & request for production of documents.
5-8-74	Filed notice to take deposition of Wm. L. Butcher, & request for production of documents.
1-28-74	Filed transcript of record of proceedings, dated Nov 16, 1973
7-8-74	Filed transcript of record of proceedings, dated Apr 4-74.
6-26-74	Filed plttf's notice of taking deposition upon oral examination & request for production of documents.
7-10-74	Filed plttfs' supplemental interogs.
7-18-74	Filed plttfs request for defts to answer interogs, & for production of documents.
8-16-74	Filed deft (Transit) answers to interogs & request for production of documents.

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DATE	PROCEEDINGS
9-10-74	Filed sealed envelope of papers pursuant to Order of 11-8-73—Griesa, J. (Placed in Cashier's vault)
9-15-74	Filed plttfs response to defts proposed findings of fact & Counter proposals of defts.
10-17-74	Filed plttfs pre-trial brief on the law.
10-17-74	Filed affdvt of service by Elizabeth B. DuBois.
10-17-74	Filed plttfs compilation of agreed to & contested facts.
10-18-74	Filed defts (Transit) pretrial memorandum.
10-18-74	Filed defts (Transit) proposed findings of fact.
10-22-74	Filed deposition of Carl A. Beazer of 1-22-74.
10-22-74	Filed defts deposition of Francisco Diaz of 2-4-74.
10-22-74	Filed defts deposition of Jose Ramon Reyes of 1-29-74.
10-22-74	Filed defts deposition of Malcolm Kenneth Frazier of 3-12-74.
11-18-74	Filed transcript of record of proceedings, dated Oct 22, 24, 25, 29—1974
11-18-74	Filed transcript of record of proceedings, dated Oct 30—1974
12-3-74	Filed transcript of record of proceedings, dated Nov 17, 1974
12-17-74	Filed plttfs memo in response to debt (Transit Auth.) motion to dismiss.

Docket Entries

DATE	PROCEEDINGS
1-2-75	Filed Order determining that Drs. Dole, Etzioni, Gollance, Kreek, Lukoff, Trigg, Primm, Rosenthal & Higgins, are to appear & testify at the trial of this action, on date & time specified—Griesa, J.
1-29-75	Filed Order directing Dr. Judianne Densen-Gerber to appear & testify at the trial in this action on 1-28-75 at 2:00 P.M. m/n Griesa, J.
2-19-75	Filed plttfs affdvt of service of filing of memorandum relating to Transit Auth. tour on the Court.
2-19-75	Filed plttfs memorandum relating to Transit Authority Tour conducted 11-13-74.
2-21-75	Filed plttfs memo relating to federal regulation of the confidentiality of methadone maintenance treatment program records.
2-21-75	Filed plttfs memo relating to the structure of the TA employment system, etc.
5-12-75	Filed transcript of record of proceedings, dated Oct. 24, 1974
5-12-75	Filed transcript of record of proceedings, dated Oct. 29, 1974
5-12-75	Filed transcript of record of proceedings, dated Jan 12, 1975
8-6-75	Filed Opinion #42931 & Order. This class action against the TA, NYC Civil Service Comm., & the NYC Personnel Dep't, & certain officials thereof, challenges the blanket exclusion from

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any form of employment in the NYC subway & bus systems, all former heroin addicts participating in methadone maintenance programs regardless of the individual merits of the employee or applicant, & against those who have successfully concluded participation. The Amended complt alleges that this policy violates due process & equal protection clauses of the Fourteenth Amendment & Federal Civil Rights Statutes. Pltffs also allege the exclusionary policy affecting blacks & hispanics, resulting in violation of the Civil Rights Act of 1964, & they seek declaratory & injunctive relief on behalf of the class, & certain monetary on behalf of the named pltffs. For the many reasons indicated in this opinion, I hold that the TA's blanket ban against the employment of all present & past methadone maintained persons in any position in the TA, is a violation of the due process & equal protection clauses of the Fourteenth Amendment. I wish to stress certain things not compelled by my holding. The TA is not required to hire any past or present methadone maintained person where there is a legitimate reason to question the persons ability or competence, etc., as indicated. As to the NYC Civil Service Comm., or the NYC Personnel Dep't officials connected with these two entities, there is no showing of any wrongdoing or need for relief. The TA will be directed to reexamine the employability

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of each of the four named pltffs & submit its conclusions to the Court. The Court will then determine whether any named pltff should be reinstated or hired & what rights to back pay there are, if any. In re to the class, pltffs are directed to submit a proposed permanent injunction based on the principles in this opinion, & the TA defts are to review & comment upon pltffs proposal. The injunction should contain certain basic directions & guidelines. Thereafter, the Court will retain jurisdiction for a period of time to implement the injunction—Griesa, J m/n

- 9-19-75 Filed transcript of record of proceedings, dated Oct 25, 1974
- 9-19-75 Filed transcript of record of proceedings, dated Jan. 7, 9, 10, 75
- 10-9-75 Filed Pltffs' Notice of Motion for Counsel Fees & Costs—ret 10-23-75—at 10 AM
- 10-9-75 Filed Pltffs' Memo in support of motion for costs.
- 11-28-75 Filed pltffs' reply memorandum in support of their motion for costs and attys' fees.
- 11-28-75 Filed pltffs' memorandum in support of their proposed order and in opposition to deft. Transit Authority's proposed counter-Order.
- 5-6-76 Filed supplemental Opinion #44357—for the reasons stated, in a Title VII case, atty's fees are

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- normally awarded to the prevailing party, unless there are exceptional circumstances indicating that such an award should not be made. No such circumstance exist in the present case. Pltffs. are clearly entitled to a fee award. A hearing will be held on the amount of the award. So ordered—Griesa, J. (m/n)
- 5-13-76 Filed Permanent Injunction and Judgment—that defts. N.Y. City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority, their members, directors, etc. are permanently enjoined and restrained as indicated and that the action be dismissed as to Civil Service Commission of the City of N.Y. and the Personnel Dept. of the City of N.Y., Harry I. Bronstein, Chairman of the Civil Service Commission and Director of the Personnel Dept., and David Stadtman and James W. Smith, members of the Civil Service Commission, and their successors in office without costs. Griesa, J. Judgment entered—5-20-76 Clerk (m/n)
- 6-15-76 Filed Undertaking for costs on appeal in the sum of \$250.00—Fidelity and Deposit Company of Maryland.
- 6-15-76 Filed Notice of Appeal of defts New York City Transit Authority, The Manhattan & Bronx Surface Transit Operating Authority & their member directors, etc. to USCA from the Judgment entered on 5-20-76 of DC Notices mailed to: Elizabeth B. DuBois, atty for pltffs, 271

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PROCEEDINGS

- Madison Ave. NYC 10016 and W. Bernard Richland, Atty. for Civil Service Commission, City of N.Y., Corporation Counsel, Municipal Bldg. NYC 10007.
- 7-7-76 Filed Order extending time of deft NYC transit Authority to submit written statement as to employability of pltffs Carl A. Beazer, Jose R. Reyes, Francisco Diaz and Malcolm K. Frazier —30 days to July 19, 1976. Griesa, J.
- 7-21-76 Filed True Copy of USCA 2nd Circuit Stip and Order that above appeal may be withdrawn without costs and without attys' fees and without prejudice, etc. as indicated.
- 9-28-76 Filed Pltffs. Notice of Motion to issue the annexed proposed order supplementing and modifying the permanent injunction and judgement entered on 5-20-76.
- 9-28-76 Filed Pltffs' Memorandum in Support of Motion to Supplement and modify the Court's Order of 5-20-76.
- 9-28-76 Filed Appendix "E" to the Memorandum in Support of the Motion to Supplement and Modify the Courts Order of 5-20-76.
- 11-1-76 Filed Pltffs Affidavit and Notice of Motion for an order declaring defts' Liability for attys' fees and to fix amt of attys' fees. Ret: 11-11-76
- 11-1-76 Filed Pltffs' Memorandum in support of motion to declare defts' liability for attys' fees and to fix amt of attys' fees.

Docket Entries

DATE	PROCEEDINGS
12-1-76	Filed defts. New York City Transit Authority, the Manhattan & Bronx Surface Transit Operating Authority, and their members, etc. notice of appeal to USCA from the permanent injunction and judgment entered on 5-20-76. Copy to: Elizabeth B. DuBois, Esq., Legal Action Center of the City of N.Y.)
12-9-76	Filed plttfs' reply memorandum in support of their motion to declare defts' liability for attys' fees pursuant to the Civil Rights Attys' fees Awards Act of 1976 and to fix the amount of attys' fees.
9-16-75	Filed transcript record of proceedings dtd: 1, 27, 28, 31, 1975 & 2, 3, 7, 1976.
9-16-75	Filed transcript record of proceedings, dtd: 2-12-75
9-16-75	Filed transcript record of proceedings dtd: Dec. 12, 16, 1974
1-12-77	Filed amended complaint
4-6-73	Filed affidavit of Elizabeth DuBois and exhibits in opposition to deft's motion to dismiss.
4-6-73	Filed affidavit of Eleanor Holmes Norton in opposition to def'ts motion to dismiss
6-29-73	Filed plttf's interrogatories and requests for production of document
1-12-77	Filed amended complaint (class action)
1-12-77	Filed order and stipulation of authenticity of documents produced

Docket Entries

DATE	PROCEEDINGS
1-12-77	Filed stipulation and order waiving requirement that deposition be
1-12-77	Filed stipulation and order of authenticity of medical records.
1-14-77	Filed notice that the record on appeal has been certified and transmitted to the USCA on this day.
1-28-77	Filed Amended permanent injunction and judgment as indicated—Griesa, J. m/n
2-10-77	Filed defts. New York City Transit Authority, The Manhattan and Bronx Surface Transit Operating Authority, and their members, directors, officers, agents and employees sued herein, amended notice of appeal to USCA from the amended permanent Injunction and Judgment entered on 1-28-77. Copy mailed to: Legal Action Center of the City of N.Y., Inc.
2-15-77	Filed plttfs' notice of appeal to USCA from that part of paragraph 9 of the amended permanent injunction and judgment dismissing the claims of plttfs. Carl A. Beazer, Jose R. Reyes and Nathaniel Wright entered on 1-28-77. Copies to: Alphone E. D'Ambrose and Corporation Counsel, City of N.Y. Ent. 2-15-77.

Docket Entries

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

76-7295

DATE	PROCEEDINGS
6-17-76	Filed copies of docket entries and notice of appeal
6-24-76	Received docket fee
6-24-76	Stuart Riedel, Esq. filed form C, p/s
6-24-76	Stuart Riedel, Esq. filed form D
6-25-76	Court reporter filed form D
6-25-76	Filed scheduling order #1 (CAMP) PC
7-13-76	Filed order withdrawing appeal without prejudice to renewal provided such renewal is filed by 12-1-76 or thirty days following the entry of an appealable order, etc. (on consent)
7-15-76	Issued certified copy of order withdrawing appeal, etc.
12-1-76	Filed copy of docket entries and notice of appeal (NYC Trans. Auth.)
12-9-76	Filed motion to vacate the stipulation dated 7-12-76 and to reinstate appeal, appellants, p/s
12-15-76	Filed order granting appellants' motion to vacate stipulation
12-29-76	Filed scheduling order #2 (CAMP)
1-14-77	Filed record (Original papers of district court)

Docket Entries

DATE	PROCEEDINGS
1-31-77	Filed motion for an extension of time to file appellants' brief and appendix, p/s
2-1-77	Filed scheduling order #3 (CAMP)
2-14-77	Filed copies of docket entries and notice of appeal (Defendants)
2-16-77	Filed copies of docket entries and notice of appeal (Plaintiffs)
2-22-77	Filed motion to consolidate appeals, to enter a scheduling order, etc., and to designate defendants appellants and plaintiffs appellees for purposes of the consolidated appeal, p/s
2-25-77	Received docket fee (Plaintiffs) (& in 77-7092)
2-25-77	Mark C. Morrill filed Form C, plaintiffs (& in 77-7092)
2-25-77	Mark C. Morrill filed Form D, plaintiffs (& in 77-7092)
2-25-77	Filed affidavit in reply to motion to consolidate appeals, p/s (N.Y.C. Transit Authority) (& in 77-7092)
2-25-77	Filed motion for deferral of appendix, appellants, p/s (N.Y.C. Transit Authority) (& in 77-7092)
2-25-77	Filed affidavit in opposition to motion for deferral of appendix, appellees, p/s (& in 77-7092)
2-25-77	Filed motion for stay of portions of amended permanent injunction and judgment, appellants, p/s (& in 77-7092)

Docket Entries

DATE	PROCEEDINGS
2-28-77	Filed scheduling order #4 (CAMP) Motions to consolidate and file a deferred appendix are denied
3-9-77	Filed order extending time to file joint appendix to 3-11-77 (on consent)
3-10-77	Filed plaintiff's memorandum in opposition to motion for stay, p/s
3-10-77	Filed briefs, appellant, p/s (& in 77-7092)
3-11-77	Filed appendix, appellant, p/s (six volumes) (& in 77-7092)
3-15-77	Filed order denying motion for stay on the merits
3-18-77	Filed motion to allow plaintiffs to file separate briefs for appeals and cross-appeal, p/s
3-23-77	Filed affidavit in opposition to motion to file two briefs, appellants, p/s (& in 77-7092)
3-30-77	Filed order denying motion for leave to file separate briefs that is a brief concerning appeals of the appellant New York City Transit Authority and a brief concerning Beazer's cross-appeal (& in 77-7092)
4-4-77	Filed appellee's briefs, p/s
4-18-77	Filed motion of the U.S. to file brief amicus curiae out of time, p/s (& in 77-7092)
4-18-77	Filed motion for leave to file amicus brief in typewritten form, amicus, p/s (U.S.) (& in 77-7092)

Docket Entries

DATE	PROCEEDINGS
4-20-77	Filed supplemental record (Original papers of district court) (& in 77-7092)
4-29-77	Filed order granting United States of America's motions for leave to file a brief as amicus curiae out of time and for leave to file said brief in typewritten form today and printed copies thereof when printed
4-29-77	Filed typewritten briefs, amicus curiae, U.S.A., p/s
4-29-77	Filed printed briefs, amicus curiae, U.S.A., p/s
5-5-77	Filed motion of N.Y.C. Transit Authority for Alphonse E. D'Ambrose to be admitted pro hac vice, p/s
5-5-77	Filed order granting motion for leave to argue the appeal pro-hac vice (D'Ambrose)
5-5-77	Argument heard (By: Mansfield, Oakes, C.J.J. Briant, DJ) (& in 77-7092)
5-18-77	Filed second supplemental record (Original papers of district court) (& in 77-7092)
6-22-77	Judgment affirmed in part, modified and affirmed in part, reversed in part and remanded (Oakes)
6-22-77	Filed Judgment (& in 77-7092)
7-7-77	Filed itemized and verified bill of costs, appellees, p/s (& in 77-7092)
7-13-77	Filed statement of costs (& in 77-7092)
7-13-77	Issued mandate (opinion, judgment and statement of costs) (& in 77-7092)

Docket Entries

DATE	PROCEEDINGS
7-18-77	Original, supplemental and second supplemental records returned to district court (& in 77-7092)
7-22-77	Filed receipt of return of original, supplemental and second supplemental records to district court (& in 77-7092)
7-26-77	Filed motion for enlargement of time to file a petition for rehearing, p/s
7-28-77	Filed motion for an order recalling this court's mandate and staying further proceedings in the district court, p/s, appellees
8-5-77	Filed memorandum in opposition to motion to recall the mandate, p/s
8-11-77	Filed order granting leave to file petition for rehearing
8-11-77	Filed petition for rehearing and rehearing en banc, w/pfs (Transit Authority)
8-11-77	Filed order granting leave to recall the mandate and stay its reissuance pending determination of petition for rehearing
8-12-77	Issued certified copy of order recalling mandate, etc., under covering letter
8-22-77	Received recalled mandate from District Court
2-1-78	Filed order denying petition for rehearing
2-1-78	Filed order denying petition for rehearing in banc

Docket Entries

DATE	PROCEEDINGS
2-16-78	Filed motion for leave to stay mandate pending application to S.C. for petition for writ of certiorari, pfs (N.Y. Transit Authority) (145)
2-21-78	Filed memorandum in opposition to motion for stay of mandate, pfs
3-10-78	Filed order granting leave to stay mandate pending application to the supreme court for a writ of certiorari S.C. #77-1427
4-7-78	Filed notice from Supreme Court of filing for petition for writ of certiorari (S.C. #77-1427)
4-7-78	Filed notice from Supreme Court of filing for petition for writ of certiorari (SC #77-1427)
6-30-78	Filed certified copy of order of Supreme Court granting petition for writ of certiorari (SC #77-1427)

Plaintiffs' Amended Complaint filed November 9, 1973

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5307

—
CARL A. BEAZER, *et al.*,

Plaintiffs,

—against—

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,

Defendants.

—
AMENDED COMPLAINT
(Class Action)

PRELIMINARY STATEMENT

1. This action is brought on behalf of persons who have been denied employment or dismissed from employment by the New York City Transit Authority (hereinafter "TA") or the Manhattan and Bronx Surface Transit Operating Authority (hereinafter "MaBSTOA") solely because of their present or past participation in methadone maintenance programs duly licensed and authorized pursuant to state and federal laws and regulations (hereinafter referred to as "duly licensed and authorized methadone maintenance programs"). The action challenges the present TA and MaBSTOA policy of refusing to employ in any position all persons participating in such programs, without regard to their individual ability to perform, as indicated by their record of performance on-the-job with

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the TA, MaBSTOA, or elsewhere, their record of adherence to the requirements of the methadone program in which they are enrolled, or any other relevant criterion.

2. The policy is challenged on the ground that it discriminates unlawfully against persons who are participating or who have participated in duly licensed and authorized methadone maintenance programs, since there is no basis for concluding that a person who is participating or who has participated in such a program is less qualified to perform as an employee of the TA or MaBSTOA, solely because of such present or past participation, than others accepted for such employment.

3. The TA's and MaBSTOA's policy is further challenged on the ground that it discriminates unlawfully against former heroin addicts who are participating or who have participated in duly licensed and authorized methadone maintenance programs, as compared to other former heroin addicts, including those participating in drug-free treatment programs. There is no reasonable ground for concluding that former heroin addicts who are presently participating or have participated in methadone maintenance programs are less qualified to perform the duties of TA or MaBSTOA employees than all other former heroin addicts.

4. The TA's and MaBSTOA's policy of firing all employees who are participating or who have participated in methadone maintenance programs is further challenged on the ground that it discriminates unlawfully against such persons, as compared to various other groups of employees

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which the TA and MaBSTOA concludes are not fully qualified to perform the duties of all its various positions. These include alcoholics and persons with such medical disabilities as epilepsy or heart conditions. It is the TA's and MaBSTOA's policy not to fire such persons if they have three years' seniority but, rather, to consider their cases on an individual basis and assign them to job positions appropriate to their condition. There is no reasonable ground for concluding that present or past methadone maintenance program participants are, as compared to persons in these groups, less qualified to perform the duties of all the various positions in the TA and MaBSTOA.

5. The action charges, therefore, that the TA's and MaBSTOA's policy with respect to present and past methadone maintenance program participants constitutes a denial of governmental employment to a particular class of persons without rational justification in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

6. The action further alleges that the TA's and MaBSTOA's policy of excluding from employment all persons who are participating or who have participated in duly licensed and authorized methadone maintenance programs has a significant and substantial discriminatory impact on blacks and Hispanics,¹ since such programs' participants are disproportionately black and Hispanic as compared to the population eligible for employment with

¹ As used herein, the term "Hispanic" refers to persons who were born or who are descended from persons who were born in Puerto Rico, Cuba or other Caribbean countries.

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the TA or MaBSTOA. The policy is therefore challenged on the additional ground that it constitutes a racially discriminatory employment criterion which has not been and cannot be demonstrated by the employer to be necessary to the safe and proper conduct of its business, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Title VII of the 1964 Civil Rights Act, as amended (42 U.S.C. §2000e *et seq.*)

7. The TA's and MaBSTOA's policy is further challenged on the ground that it conflicts with federal laws and regulations authorizing methadone maintenance treatment as one means of dealing with the problem of drug abuse. It is alleged that the TA's and MaBSTOA's policy burdens and impedes participation in duly licensed and authorized methadone maintenance programs in derogation of rights recognized by statutes and regulations of the United States.

JURISDICTION

8. This is a civil action brought under 42 U.S.C. §1981 providing for the equal rights of citizens and of all persons within the jurisdiction of the United States, including the right to contract; under 42 U.S.C. §1983, to redress the deprivation under color of state statute, ordinance, regulation, custom or usage of rights, privileges and immunities secured by the Constitution and laws of the United States; and under Title VII of the 1964 Civil Rights Act, as amended (42 U.S.C. §2000e *et seq.*) Plaintiffs seek a declaratory judgment, pursuant to 28 U.S.C. §2201, a permanent injunction, and such other relief as may be appro-

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priate to remedy the unlawful discrimination practiced by defendants against plaintiffs and all others similarly situated. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1343(3) and (4); 42 U.S.C. §2000e-5(f)(3); and 28 U.S.C. §1331(a). The amount in controversy, exclusive of interest and costs, exceeds ten thousand dollars (\$10,000) for each of the named plaintiffs.

CLASS ACTION ALLEGATIONS

9. Plaintiffs bring this action on their own behalf and on behalf of all those similarly situated, pursuant to Rule 23(b)(1) and (2) of the Federal Rules of Civil Procedure.

10. It is impossible to enumerate with any precision the members of the class, but it is clear that the class is so numerous that joinder of all members is impracticable.

11. The class consists of:

A. All those persons who have been dismissed from employment by the TA or MaBSTOA, or would in the future be subject to dismissal, solely because of their present or past participation in duly licensed and authorized methadone maintenance programs;

B. All those persons whose applications for employment with the TA or MaBSTOA have been rejected, or would in the future be subject to rejection, solely because of their present or past participation in duly licensed and authorized methadone maintenance programs;

C. All those persons who have been or will in the future be deterred from applying for employment with

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the TA or MaBSTOA by the TA's and MaBSTOA's policy of excluding from such employment all persons who are participating or who have participated in duly licensed and authorized methadone maintenance programs.

12. The plaintiffs will fairly and adequately protect the interests of the class. Each of them either was dismissed from employment with the TA or MaBSTOA or had his application for such employment denied, solely because of his present or past participation in a duly licensed and authorized methadone maintenance program. Their claims are typical of the claims of the class.

13. The questions of law and fact common to the class include the following:

A. Whether the TA's and MaBSTOA's policy of excluding from employment all persons who are participating or who have participated in duly licensed and authorized methadone maintenance programs, discriminates against such persons on an irrational basis, as compared to all other persons eligible for employment with the TA or MaBSTOA, and thereby violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution;

B. Whether the TA's and MaBSTOA's policy of excluding from employment all persons who are participating or who have participated in duly licensed and authorized methadone maintenance programs, discriminates against such persons on an irrational basis,

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as compared to other former heroin addicts, including those participating in drug-free treatment programs, and thereby violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution;

C. Whether the TA's and MaBSTOA's policy of dismissing from employment all persons who are participating or who have participated in duly licensed and authorized methadone maintenance programs, discriminates against such persons on an irrational basis as compared to various other groups of employees which the TA or MaBSTOA concludes are not fully qualified to perform the duties of all its various positions, and thereby violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution;

D. Whether the TA's and MaBSTOA's policy of excluding from employment all persons participating in duly licensed and authorized methadone maintenance programs, constitutes a racially discriminatory employment criterion which has not been and cannot be demonstrated by the TA or MaBSTOA to be necessary to the safe and proper conduct of its business, and thereby violates the Equal Protection Clause to the Fourteenth Amendment to the United States Constitution and Title VII of the 1964 Civil Rights Act, as amended (42 U.S.C. §2000e *et seq.*);

E. Whether the TA's and MaBSTOA's policy of excluding from employment all persons who are participating or who have participated in duly licensed

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and authorized methadone maintenance programs, burdens and impedes participation in such programs, in derogation of rights recognized by statutes and regulations of the United States;

F. What relief would be appropriate on behalf of the class.

PARTIES

14. Plaintiff Carl A. Beazer, a black, resides at 1074 Summit Avenue, Bronx, New York. He was hired by the TA in May, 1960. He was dismissed by the TA on August 15, 1972, solely because of his participation in a duly licensed and authorized methadone maintenance program.

15. Plaintiff Jose R. Reyes, an Hispanic, resides at 12-11 31st Avenue, Astoria, New York. He was hired by the TA in April, 1968. He was dismissed by the TA on September 29, 1972, solely because of his participation in a duly licensed and authorized methadone maintenance program.

16. Plaintiff Francisco Diaz, an Hispanic, resides at 3865 Baychester Avenue, Bronx, New York. He passed the examination for the position of Maintainer's Helper with the TA administered in or about February of 1970. At his preappointment medical examination he was found medically disqualified, and he was denied employment with the TA, on September 23, 1970, and continues to be excluded from such employment, solely because of his participation in a duly licensed and authorized methadone maintenance program.

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16a. Plaintiff Malcolm K. Frasier, a black, resides at 1830 Lexington Avenue, New York, New York. He passed both the examination for the position of Bus Cleaner with MaBSTOA administered in or about late 1968 or early 1969, and the examination for the position of Bus Operator with MaBSTOA administered in or about October, 1972. At his preappointment medical examination for the position of Bus Operator he was found medically disqualified and was denied such employment with MaBSTOA on March 14, 1973, and continues to be excluded from such employment, due solely to the fact that he was then participating in a duly licensed and authorized methadone maintenance program. At his preappointment medical examination for the position of Bus Cleaner he was found medically disqualified and was denied such employment with MaBSTOA on April 12, 1973, and continues to be denied such employment, solely because of his past participation in a duly licensed and authorized methadone maintenance program.

17. Defendant TA exists pursuant to the laws of the State of New York (N.Y. Pub. Auth. Law §1201(1)), and is declared by law to be a body corporate performing a governmental function (N.Y. Pub. Auth. Law §1201(1) and §1202(2)). It has as its purpose, *inter alia*, the operation of the New York City subway system (N.Y. Pub. Auth. Law §1202(1)). In furtherance of that purpose it employs approximately 42,000-43,000 persons.

17a. Defendant MaBSTOA exists pursuant to the laws of the State of New York (N.Y. Pub. Auth. Law §1203-a(2)), and is declared by law to be a public benefit corporation which is a subsidiary corporation of defendant TA (N.Y. Pub. Auth. Law §1203-a(3)). It has as its purpose,

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inter alia, the operation of certain omnibus lines in New York City (N.Y. Pub. Auth. Law §1203-a(3)). In furtherance of that purpose it employs approximately 7,000-8,000 persons.

18. Defendant William J. Ronan is a member of the TA and a director of MaBSTOA and serves as the chairman of the TA and MaBSTOA. He also serves as the TA's and MaBSTOA's chief executive officer and is responsible, *inter alia*, for the appointment, discipline and removal of the TA's and MaBSTOA's employees (N.Y. Pub. Auth. Law §§1201(2), 1203-a(2)).

19. Defendants William L. Butcher, Lawrence R. Bailey, Harold L. Fisher, William A. Shea, Eben W. Pyne, Leonard Braun, Justin N. Feldman, Donald H. Elliott, Frederic B. Powers and Mortimer Gleeson are all members of the TA and directors of MaBSTOA. Together with defendant Ronan they constitute all of the TA's members and all of MaBSTOA's directors.

20. Defendant Wilbur B. McLaren is the executive officer in charge of labor relations and personnel for the TA, and defendant Louis Lanzetta is its medical director.

21. Defendant New York City Civil Service Commission is responsible for promulgating rules governing the appointment, promotion and continuance of employment of all employees of the TA (N.Y. Pub. Auth. Law §1210(2)).

22. Defendant New York City Department of Personnel applies medical standards to applicants for employment with the TA.

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23. Defendant Harry I. Bronstein serves as a member and as chairman of the Civil Service Commission, and as director of the Personnel Department.

24. Defendants David Stadtmauer and James W. Smith are members of the Civil Service Commission. Together with defendant Bronstein they constitute the Civil Service Commission's entire membership.

FACTUAL ALLEGATIONS

The TA's and MaBSTOA's Policy

25. The TA and MaBSTOA maintain an absolute policy against the employment, in any capacity, of persons who are participating or who have participated in methadone maintenance programs, without regard to their individual ability to perform as demonstrated by their performance on-the-job with the TA or elsewhere, their record of adherence to the requirements of the methadone maintenance program in which they are participating or have participated, or any other relevant criterion.

26. This policy is enforced by means of a program initiated in or about March, 1970, for the purpose of screening out drug users, under which medical examinations, including urinalyses, are administered on a periodic basis to most TA and MaBSTOA employees, and are administered to applicants for employment prior to appointment.

27. Execution of this policy resulted in the dismissal of plaintiff Beazer from employment with the TA.

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A. Plaintiff Beazer was employed by the TA for eleven years, prior to his dismissal. During that period he demonstrated his ability to perform the duties of a variety of TA positions in a superior manner. He received a number of promotions, each of which was based on an assessment of his record, together with his performance on written and practical examinations designed to test a candidate's ability to perform the duties of the position being tested for. Through this process he was promoted from the position of car cleaner to conductor and, on May 15, 1966, to towerman. His performance as a towerman resulted in his being assigned the task of training many new employees.

B. In late April of 1971, plaintiff Beazer voluntarily entered the Methodone Maintenance Treatment Program administered by the United States Veterans Administration Hospital located in Manhattan. While participating in this program he continued to perform the duties of his position as towerman in a fully satisfactory manner, from approximately mid-July, 1971, until he was suspended on or about September 1, 1971.

C. On or about August 31, 1971, the TA received records from the Veterans Administration Hospital, in response to its request, indicating that plaintiff Beazer had been receiving methadone maintenance treatment, as a result of which he was immediately suspended from employment, and on October 4, 1971, charged with violating a TA regulation prohibiting the use of drugs. The charges specifically accused him of being "on a drug treatment program."

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D. A hearing on these charges was conducted on November 3, and November 22, 1971. During the hearing the TA conceded that it maintained an absolute policy requiring dismissal of and denial of employment to, methadone maintenance program participants. Beazer conceded the charge that he was on a methadone maintenance program, but contended that that alone should not justify his dismissal. A specific request was made that if it was determined some disciplinary action was warranted, he be transferred from his job as towerman to a less critical job. On November 26, 1971, the Hearing Referee recommended that the charges be sustained and that Beazer be dismissed, effective November 26, 1971.

E. On June 29, 1972, the Impartial Disciplinary Review Board of the TA recommended that the Hearing Referee's recommendation be sustained. The Board noted that Beazer "has done his job well and has received a relatively few cautions and warnings for the time that he has been employed." It noted further that "from all of the evidence presented, it would appear that Mr. Beazer had handled his job competently while participating in the methadone maintenance program." The Board made its recommendation solely on the basis of findings that Beazer had in fact violated the rule prohibiting the use of drugs by reason of his participating in a methadone maintenance program. The Board urged the TA to reconsider its rules relating to drug users:

"to determine to what extent, if any, they should be revised in the light of modern medical and scientific

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advances in the treatment of drug usage. Moreover, it is the recommendation of this Board, that if it is found that an employee using methadone can work in some capacity for the Authority, the Authority take whatever steps that are necessary to reemploy Carl A. Beazer."

F. On August 15, 1972, the TA, without issuing an opinion or giving any reasons for its ruling, adopted the recommendations made in the disciplinary procedure, and dismissed Beazer from employment, effective November 26, 1972.

G. Plaintiff Beazer has had an excellent record in the Veterans Administration Methadone Maintenance Treatment Program from the time he entered, in April of 1971, to date. The Hearing Referee noted in his opinion that "credible evidence" had been presented:

"that he has never missed coming in and picking up his methadone, and that he is known to be complying with the program because urine samples are taken twice a week and tested.

"It therefore must be concluded that Respondent [Beazer] is adhering to the program. He was described as an 'excellent patient.'"

H. Following Beazer's suspension by the TA, he was employed by the Veterans Administration in their drug detoxification program as a rehabilitation technician counselor.

28. Execution of the TA's and MaBSTOA's policy against the employment, in any capacity, of persons who

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are participating or who have participated in methadone maintenance programs, resulted in the dismissal of plaintiff Reyes.

A. Plaintiff Reyes was employed by the TA for almost four years, prior to his dismissal. During that period he demonstrated his ability to perform the duties of different positions with the TA in a superior manner. During his period of employment with the TA he was promoted from the position of Maintainers' Helper to Ventilation and Drainage Maintainer. This promotion was based on an assessment of his record, together with his performance on written and practical examinations designed to test a candidate's ability to perform the duties of the position being tested for. From approximately May 1, 1969, he was responsible for the training and supervision of numerous apprentices.

B. On or about March 1, 1970, plaintiff Reyes voluntarily entered the Beth-Israel Methadone Maintenance Treatment Program, at the St. Claire Hospital. He continued to perform the duties of his position as ventilation and Drainage Maintainer in a fully satisfactory manner for a period of over one and one-half years, until on or about November 1, 1971, when he was suspended from employment.

C. As a result of a medical examination, conducted on November 1, 1971, the Medical Director of the TA, defendant Lanzetta, discovered that plaintiff Reyes had been receiving methadone maintenance treatment, and told Reyes at that time that he was being suspended because of his participation in methadone main-

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tenance treatment. He was suspended effective immediately, and on December 13, 1971, was charged with violating a TA regulation prohibiting the use of drugs.

D. A hearing on these charges was conducted on January 19, 1972. During the hearing the TA's absolute policy against the employment of methadone Medical Director of the TA, defendant Lanzetta, testified that he never gave, and it was his policy not to give, permission to TA employees to participate in methadone maintenance programs under any circumstances. And the Hearing Referee noted that the TA's "policy of not permitting employees who are under methadone treatment to remain in the system" had been established. Reyes conceded the charge that he was on a methadone maintenance program, but contended that that alone should not justify his dismissal. There was testimony that scientific tests administered to Reyes by a recognized expert demonstrated that Reyes' psychomotor performance while maintained on methadone, as determined by tests of his rotary pursuit skills and reaction times, was normal or above normal, as was his intellectual performance. On January 21, 1972, the Hearing Referee recommended that the charges be sustained and that Reyes be dismissed.

E. On September 29, 1972, the TA, without issuing an opinion or giving any reasons for its ruling, sustained the charges and dismissed Reyes from employment, effective January 20, 1972.

F. Plaintiff Reyes has had an excellent record in the Beth-Israel Methadone Maintenance Treatment Program at the St. Claire Hospital from the time he

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entered, in March of 1970, to date. There was testimony at his hearing by the Medical Director of the St. Claire program that he had an excellent record, had never failed to come in to get his methadone as scheduled, and did not use drugs other than methadone.

G. He has been employed by the Mt. Sinai Methadone Maintenance Treatment Program as a social health advocate from January 17, 1972, to date.

29. Execution of the TA's and MaBSTOA's policy against the employment, in any capacity, of persons who are participating or who have participated in methadone maintenance programs, resulted in the denial of such employment to plaintiff Diaz.

A. Plaintiff Diaz has been employed as a sheet metal mechanic with the same employer since approximately March, 1962, a period of almost eleven years. He has participated in the Bernstein Institute Methadone Maintenance Treatment Program of the Beth-Israel Medical Center since November of 1969, a period of approximately three years. Throughout his period of employment he has demonstrated his ability to perform in a superior manner. His fellow workers have elected him union shop steward for the last eight years, in recognition of his leadership abilities.

B. In or about February of 1970, plaintiff Diaz took the examination for the position of Maintainer's Helper with the TA, which he passed. At the preappointment medical examination, on or about June 5, 1970, he revealed the fact that he was a methadone maintenance program participant, and submitted letters from Dr.

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Harold L. Trigg, Chief of the Methadone Maintenance Service, Associate Director of Psychiatry, and Associate Director of the Bernstein Institute, Beth-Israel Medical Center, and from a staff medical doctor. These letters testified to his excellent record in the Beth-Israel Program and specifically noted that he had been totally free of illicit drug use throughout his period of participation in the program. After having successfully completed all aspects of the medical examination, he was told that he was disqualified because methadone program participants were not accepted for employment with the TA.

C. Diaz appealed his "medical disqualification" to the TA and was notified that he did not meet the requirements as established by the TA and the Personnel Department. His subsequent appeal to the City Civil Service Commission was denied without opinion on September 23, 1970.

30. Plaintiff Diaz has had an excellent record of participation in the Beth-Israel Methadone Maintenance Treatment Program from the time he entered, in November of 1969, to date.

30a. Execution of the TA's and MaBSTOA's policy against the employment, in any capacity, of persons who are participating or who have participated in methadone maintenance programs, resulted in the denial of such employment to plaintiff Frasier.

A. Plaintiff Frasier has held several positions of employment over the last ten years, and in all such positions has demonstrated his ability to perform as a

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competent worker. Several of these positions have been as a truck driver, and one has been as a taxicab driver. In October of 1972, plaintiff Frasier began participating in the methadone maintenance program conducted by the Methadone Maintenance Treatment Center. On March 17, 1973, he left this program as a drug-free person after having completed a two month long process of detoxifying from methadone.

B. In or about late 1968 or early 1969, plaintiff Frasier took an examination for the position of Bus Cleaner with MaBSTOA, and in or about October of 1972, he took an examination for the position of Bus Operator with MaBSTOA. He passed both of these examinations.

C. At a preappointment medical examination for the position of Bus Operator, on or about March 9, 1973, plaintiff Frasier revealed that he had been a methadone maintenance program participant, but that he had almost completely detoxified from methadone. He was then taken to see Thomas L. Granger, MaBSTOA Administrative Manager for Personnel and Saul Solano, a MaBSTOA Administrative Associate. Both men informed him that it was the TA's policy not to employ persons with his record of methadone maintenance participation. In a letter dated March 14, 1973, Mr. Granger informed plaintiff Frasier that he would not be employed by MaBSTOA as a Bus Operator because "Your background does not meet the standards established for this position." Upon subsequent inquiry from plaintiff Frasier's counsel, Mr. Granger stated in a letter dated April 19, 1973, that plaintiff

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Frasier had been denied the Bus Operator's position "because of medical background based on information he divulged to our Medical Director."

D. On or about March 22, 1973, plaintiff Frasier was notified that he was eligible to take a preappointment medical examination, on April 2, 1973, for the position of Bus Cleaner. Plaintiff Frasier reported for that examination, but instead of being allowed to complete it he was instructed to see Mr. Solano. Plaintiff Frasier informed Mr. Solano that he had detoxified from methadone on March 17, 1973, but Mr. Solano replied that he still could not be employed with MaBSTOA due to his past participation in methadone maintenance. In a letter dated April 12, 1973, Mr. Granger informed plaintiff Frasier that he would not be employed by MaBSTOA as a Bus Cleaner because "Your background does not meet the standards established for this position."

30b. Plaintiff Frasier had an excellent record as a methadone maintenance program participant. In a letter to the MaBSTOA medical department dated March 29, 1972, prior to plaintiff's rejection as a Bus Cleaner, Dr. G. Salazar, Clinical Director of the Methadone Maintenance Treatment Center, attested to this fact. Since plaintiff Frasier's withdrawal from methadone maintenance he has continued to report to the Methadone Maintenance Treatment Center for counseling and urinalyses on a regular basis. During this period he has shown no evidence of illicit drug use.

31. The present "Medical Standards and Regulations For All Operations and Maintenance Positions" with the

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TA, proposed by the TA and issued May 7, 1971, by the City Civil Service Commission provide that at the pre-appointment medical examination a candidate will be disqualified for appointment if his urinalysis reveals the presence of "unauthorized" substances, and if "drug addiction or drug abuse" are determined. The TA and the Civil Service Commission define these terms to include methadone maintenance. These standards govern 53 classes of positions, and 81 per annum positions, covering approximately 35,000-36,000 TA employees. Positions governed included, for example, the following: Bus Maintainer, Car Cleaner, Car Inspector, Car Maintainer, Collecting Agent, Light Maintainer, Maintainer's Helper, Railroad Clerk, Railroad Porter, Telephone Maintainer, Turnstile Maintainer, Ventilation and Drainage Maintainer.

The TA and MaBSTOA Policy Was Adopted Without Adequate Grounds for Concluding It Was Reasonable or Necessary

32. The TA and MaBSTOA adopted their absolute policy against the employment of present and past methadone maintenance program participants, without having had any rational grounds for concluding that a person is not qualified satisfactorily to perform the duties of a TA or MaBSTOA employee, in any capacity, solely by virtue of his participation in such a program.

33. The TA and MaBSTOA made no effort to analyze the requirements of the many jobs to which their employees may be assigned, in order to determine the relevance of a person's present or past participation in a methadone maintenance program to his ability to perform the various different kinds of jobs.

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34. The TA and MaBSTOA made no effort to assess the performance of TA or MaBSTOA employees who were participating or who had participated in methadone maintenance programs, and had no evidence that such employees were failing to perform the duties of their positions satisfactorily, or were not qualified to perform satisfactorily the duties of other positions within the TA or MaBSTOA prior to instituting the policy requiring their discharge and prohibiting the employment of any other such persons.

35. The TA and MaBSTOA had no reliable data related to the characteristics of present or past participants in duly licensed and authorized methadone maintenance programs indicating that such persons would not be able satisfactorily to perform the duties of TA or MaBSTOA employees:

A. The TA and MaBSTOA had no reliable data indicating that the taking of methadone pursuant to duly licensed and authorized methadone maintenance programs would adversely affect any functional capability which might be related to performance of the duties of TA or MaBSTOA employees;

B. The TA and MaBSTOA had no reliable data indicating that present or past participants in duly licensed and authorized methadone maintenance programs were more likely to be abusing drugs so as to adversely affect their ability to perform the duties of TA or MaBSTOA employees, than other persons accepted for employment.

36. The TA and MaBSTOA, therefore, adopted their absolute policy against the employment of present and past

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methadone maintenance program participants without having had any reasonable grounds for concluding that said policy was necessary, or indeed that it was rationally related, to the safe and proper conduct of their business.

The TA and MaBSTOA Policy Cannot be Justified as Reasonable or Necessary

37. All available data indicate, in fact, that a person's ability satisfactorily to perform the duties of a TA or MaBSTOA employee would not be adversely affected solely by virtue of his present or past participation in a duly licensed and authorized methadone maintenance program.

38. Methadone maintenance is a widely recognized, officially sanctioned and increasingly dominant form of treatment for persons suffering from addiction to heroin. It is designed to prevent such persons from using heroin, and to enable them to work and otherwise lead productive lives in society.

39. Methadone has been under investigation for use in the maintenance treatment of persons addicted to heroin for more than nine years. Methadone maintenance is now a well-established mode of treatment, pursuant to which stabilizing doses of methadone are administered on a daily basis in order to eliminate the addict's psychological and physiological craving for heroin, and to establish a "blockade" shielding the former addict from the mental and physical effects of heroin.

40. After achieving favorable results with experimental programs, New York State became committed to methadone

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maintenance on a large scale approximately three years ago. In January of 1970, Governor Rockefeller asked the New York State Legislature for millions of dollars to make "outpatient methadone facilities available . . . in every community with a substantial addiction problem" (Governor's Budget Message, Session Laws of New York 3053 (McKinney's 1970)). Methadone maintenance is now the dominant mode of treatment for heroin addiction in New York. In the New York City area alone, federal, state and local funds support more than twenty separate methadone maintenance programs with approximately 28,000 participants. The number of persons maintained on methadone is continually increasing.

41. The Food and Drug Administration of the United States Department of Health, Education and Welfare, after consultation with numerous professional groups, advisory committees and individual experts, recognized methadone's established value in the maintenance treatment of heroin addiction by proposing on April 5, 1972, that the drug be removed from its experimental classification under existing federal regulations (Proposed 21 C.F.R. §130.48(b), 37 Fed. Reg. 6940 (1972)). A regulation implementing this recommendation is to be published shortly.

42. Under federal statutes, and both proposed and existing federal regulations, the operations of methadone maintenance programs are strictly controlled, and participation in such programs is carefully monitored. Any person dispensing methadone must register annually with the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, and obtain the approval of the Food and

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Drug Administration (21 U.S.C. §822; 21 C.F.R. §301; 21 U.S.C. §355; 21 C.F.R. §130.44; Proposed 21 C.F.R. §130.48 (b), 37 Fed. Reg. 6940 (1972)). Present New York State regulations also require that dispensers of methadone obtain certificates of approval and registration issued by the New York State Department of Health, Bureau of Narcotic Control, pursuant to §3311 of the New York Public Health Law (10 N.Y.C.R.R. §80.23). After April 1, 1973, certification under a detailed regulatory scheme established by Title V of the New York Controlled Substances Act will be required of all methadone maintenance programs in the State. Failure to comply with either the state or federal regulatory structure renders the operator of a methadone maintenance program criminally liable.

43. The Food and Drug Administration requires that methadone maintenance program participants be medically tested at least once weekly for evidence of the use of heroin or any other drug clinically indicated (21 C.F.R. §130.44(c) (6); Proposed 21 C.F.R. §130.48(b)(2), 37 Fed. Reg. 6942 (1972)).

44. Pursuant to the laws and regulations cited in paras. 41-42 above, and their own policies, administrators of methadone maintenance programs in the New York City area have instituted a variety of procedures to ensure that participants take their methadone as prescribed, and to determine whether they take illicit drugs. These procedures include, *inter alia*: supervision of the administration of methadone to ensure that it is taken on a regular basis as prescribed; regular urinalysis (at least one weekly) to determine whether the prescribed methadone is being taken

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and also whether there has been illicit drug use; supervision and monitoring by counselors and other supportive personnel who are proficient in detecting the symptoms of illicit drug use.

45. The TA and MaBSTOA have no comparable procedures to assure themselves that their employees are not using illicit drugs. On information and belief it is the TA's and MaBSTOA's policy at present to test their employees for illicit drug use only approximately once a year, and persons in certain positions of employment with the TA and MaBSTOA are apparently never tested.

46. Scientifically designed and administered studies have uniformly found that methadone maintenance has no adverse effect on performance effectiveness. These studies are based on tests of intellectual functioning, and of psychomotor performance as determined by rotary pursuit tests and by visual and auditory reaction-time tests. Studies of the performance of persons in situations requiring both skilled performance and social responsibility also show that methadone maintenance has no adverse effect.

47. The City of New York has recognized both the employability, and the need for employment, of ex-addicts, including ex-addicts who are or who have participated in methadone maintenance programs. On March 22, 1972, the City's Department of Personnel published a personnel policy and procedure bulletin relating to "City Policy on Employment of Ex-Drug Addicts." It notes that the policy resulted from "an intensive study of the employability of ex-drug addicts." And it provides that ex-addicts, including

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specifically those persons participating in methadone maintenance programs, shall not be automatically disqualified from employment in any City position except the uniformed services.

48. The TA's and MaBSTOA's absolute policy against the employment of methadone maintenance program participants is therefore not necessary, and indeed is not rationally related, to the safe and proper conduct of their business.

The TA's and MaBSTOA's Policy Discriminates Against Methadone Maintenance Program Participants as Compared to Other Former Heroin Addicts

49. The TA and MaBSTOA do not maintain an absolute policy against the employment of former heroin addicts who have not participated in methadone maintenance programs. Instead the TA and MaBSTOA make decisions as to the employment of such persons based on the circumstances of the individual case.

50. There is no reasonable ground for concluding that former heroin addicts who are presently participating or who have participated in duly licensed and authorized methadone maintenance programs are less qualified to perform the duties of TA and MaBSTOA employees than all other former heroin addicts, including those participating in drug-free treatment programs.

*The TA's and MaBSTOA's Policy Discriminates Against Present and Past Methadone Maintenance Program Par-**Plaintiffs' Amended Complaint filed November 9, 1973**ticipants as Compared to Other Groups Which the TA and MaBSTOA Conclude Are Not Fully Qualified For All Their Positions*

51. The TA and MaBSTOA do not maintain an absolute policy requiring the discharge of employees suffering from a variety of medical or other disabilities including alcoholism, epilepsy, or heart conditions, who are as a result, in the TA's and MaBSTOA's opinion, not fully qualified to perform the duties of all their various positions. Instead the TA and MaBSTOA allow such persons, under certain circumstances, to continue in their employ, limiting them to select positions where that appears necessary. Thus, for example:

A. TA and MaBSTOA employees with three years' seniority who are discovered to be alcoholics are not automatically discharged. Instead they are suspended from duty and provided with an opportunity to attend an alcoholic treatment program. Upon discharge by the treatment center the alcoholic is allowed to resume work with the TA or MaBSTOA in a non-critical position. If he maintains a good record for three subsequent years, he will be eligible for his previous position, even if it is a critical, safety-sensitive position. Approximately 3,000 employees are now participating in the TA's alcoholism program, receiving treatment and/or counselling.

B. TA and MaBSTOA employees with three years' seniority who are discovered to have medical disabilities such as epilepsy or heart conditions, are placed, whenever possible, in "limited service" positions, rather than being discharged. The TA now has approximately 1,500 employees in limited service positions.

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52. There is no reasonable ground for concluding that methadone maintenance program participants are less qualified to perform the duties of all the various positions within the TA or MaBSTOA than employees in the groups referred to in para. 51 above.

The TA's and MaBSTOA's Policy Has a Racially Discriminatory Impact

53. Statistics available from the United States Department of Commerce, Bureau of the Census indicate that the civilian workforce² for the New York Standard Metropolitan Statistical Area³ is approximately 15.0% black and 5.1% Hispanic. The racial composition of this population can be assumed to approximate the racial composition of the population eligible for employment with the TA and MaBSTOA save for their policy of excluding all present and past methadone maintenance program participants. The methadone maintenance population, essentially a subgroup of the civilian workforce, is approximately 30.3% black and 19.7% Hispanic.⁴ This data indicates that the

² "Civilian workforce" is defined by the Bureau of the Census to include all non-military persons who are either employed, or looking for and available to accept employment.

³ "Standard Metropolitan Statistical Area" (SMSA) is a designation utilized by the Bureau of the Census. Counties contiguous to a county or counties containing a city of 50,000 persons or more are included in a SMSA if, according to criteria established by the Bureau of the Census, they are socially and economically integrated with the central city. The New York SMSA includes New York City and Westchester, Rockland, Nassau and Suffolk Counties. It comprises the area from which the TA and MaBSTOA can reasonably be expected to draw their 49,000-51,000 employees.

⁴ Records regarding the ethnic composition of the methadone maintenance population are maintained by the Rockefeller Uni-

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probability of a black or Hispanic person being denied employment by the TA or MaBSTOA due to his present or past participation in methadone maintenance is substantially and significantly higher than the same probability for his white counterpart.

54. Hence, the TA's and MaBSTOA's policy of excluding all present and past methadone maintenance program participants from employment has a significant and substantial discriminatory impact upon black and Hispanic persons otherwise eligible for TA and MaBSTOA employment.

The TA's and MaBSTOA's Policy Burdens and Impedes Participation In Methadone Maintenance Treatment

55. Federal law, and the regulations and policies of various federal governmental agencies, support the right to participate in methadone maintenance treatment. Thus the Drug Abuse Office and Treatment Act of 1972, Public Law 92-255, 86 Stat. 65, sect. 101(8), provides that: "Control of drug abuse requires the development of a comprehensive, coordinated long-term federal strategy that encompasses . . . effective health programs to rehabilitate victims of drug abuse." The federal regulations referred to in paras. 41-43 above provide a regulatory scheme pursuant to which persons can legally be maintained on methadone. Federal agencies provide substantial financial support for the conduct of methadone maintenance programs.

versity Methadone Information Center. Under contract to the New York State Narcotic Addiction Central Commission, the center is responsible for gathering extensive information concerning methadone maintenance in the New York City metropolitan area.

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56. Employment is generally recognized to be crucial to the success of a methadone maintenance treatment program. Thus, for example, the "City Policy on Employment of Ex-Drug Addicts" referred to in para. 47 above, states that "the assurance to the addict of a gainful and rewarding employment is an essential motivating force for undertaking and completing treatment for his addictive habit."

57. Methadone maintenance is a treatment modality which may last anywhere from a few years to a lifetime. Employment opportunity for program participants is, therefore, additionally essential.

58. The TA's and MaBSTOA's policy of excluding from employment all methadone maintenance program participants tends to discourage persons from participating in methadone maintenance programs, penalizes persons who do participate, and reduces their opportunities for rehabilitation.

VIOLATIONS OF LAW

59. As a result of the defendants continuing pattern and practice of discrimination, as illustrated by the specific examples of discrimination described above, plaintiffs and the class they represent have been and are being denied employment with the TA and MaBSTOA in derogation of their rights under the Fourteenth Amendment to the United States Constitution; under 42 U.S.C. §§1981 and 1983; and Under Title VII of the 1964 Civil Rights Act, as amended (42 U.S.C. §2000e *et seq.*).

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60. The TA's and MaBSTOA's policy of excluding from employment, in any capacity, all present and past participants in methadone maintenance programs violates their rights in that:

A. The policy results in the denial of public employment to certain classes of persons without rational justification in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution;

B. The policy has a significant and substantial discriminatory impact on black and Hispanic persons otherwise eligible for TA and MaBSTOA employment, and neither has been nor can be justified by the TA and MaBSTOA as necessary to the safe and proper conduct of their business, in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution and Title VII of the 1964 Civil Rights Act, as amended (42 U.S.C. §2000e *et seq.*);

C. The policy burdens and impedes participation in duly licensed and authorized methadone maintenance programs in derogation of rights recognized by statutes and regulations of the United States.

IRREPARABLE INJURY

61. Plaintiffs and the class they represent have no adequate remedy at law. Plaintiffs have suffered, are suffering, and will continue to suffer irreparable injury as a result of defendants' discriminatory policies and practices unless and until the relief demanded in this complaint is granted.

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PRAYER FOR RELIEF

WHEREFORE, plaintiffs individually, and on behalf of all others similarly situated, respectfully pray that this Court:

A. Declare, pursuant to 28 U.S.C. §2201, that defendants' refusal to employ, in any capacity, all persons who are participating or who have participated in duly licensed and authorized methadone maintenance programs is in violation of the laws and the Constitution of the United States;

B. Enjoin defendants, their agents, employees, and all those acting in concert with them, and their successors, from refusing to employ, in any capacity, persons who are participating or who have participated in duly licensed and authorized methadone maintenance program solely because of such participation;

C. Order that plaintiffs, Beazer, Reyes, Diaz and Frasier and all other members of the class they represent who were dismissed, or whose applications for employment were denied, solely because of their participation in duly licensed and authorized methadone maintenance programs, be provided employment with the TA or MaBSTOA in positions appropriate to their abilities and experience together with backpay and other benefits of employment from the date they were unlawfully discharged or denied employment;

D. Retain jurisdiction of this action until such time as the Court can be assured defendants are complying with its order;

E. Award plaintiffs their costs, including disbursements and reasonable attorneys' fees;

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F. Grant such other and further relief as may be proper.

Dated: New York, New York
November 8, 1973

Respectfully submitted,

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Attorneys for Plaintiffs

**Answer of Defendant New York City Transit Authority
and Related Defendants to Amended Complaint**

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

72 Civ. 5307

CARL A. BEAZER, *et al.*,

Plaintiffs,

—against—

NEW YORK CITY TRANSIT AUTHORITY,

Defendants.

ANSWER OF DEFENDANTS NEW YORK CITY TRANSIT AUTHORITY,
ET AL. TO PLAINTIFFS' AMENDED COMPLAINT

The defendants, NEW YORK CITY TRANSIT AUTHORITY, WILLIAM J. RONAN, WILLIAM L. BUTCHER, LAWRENCE R. BAILEY, HAROLD L. FISHER, WILLIAM A. SHEA, EBEN W. PYNE, LEONARD BRAUN, JUSTIN N. FELDMAN, DONALD H. ELLIOTT, FREDERIC B. POWERS, MORTIMER GLEESON, WILBUR B. McLAREN, and LOUIS LANZETTA, by their attorney, JOHN G. DE ROOS, answering the amended complaint:

First: Deny they have knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 30, 30b, 38, 39, 41, 42, 43, 44, 55, 56 and 57.

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Second: Deny the allegations of paragraph 14 except (a) admit that the plaintiff Carl A. Beazer is black and was hired by the Transit Authority on May 11, 1960 and dismissed August 15, 1972 and (b) deny they have knowledge or information sufficient to form a belief as to the truth of the allegations respecting Beazer's residence.

Third: Deny the allegations of paragraph 15 except (a) admit that the plaintiff Jose R. Reyes was hired by the Transit Authority on April 29, 1968 and dismissed on September 29, 1972 and (b) deny they have knowledge or information sufficient to form a belief as to the truth of the allegations respecting Reyes' ethnic background or place of residence.

Fourth: Deny the allegations of paragraph 16 except (a) admit that the plaintiff Francisco Diaz passed an examination for the position of Maintainer's Helper given by the City Civil Service Commission on or about February 28, 1970, but was medically disqualified for employment with the Transit Authority and denied appointment on June 5, 1970 and (b) deny they have knowledge or information sufficient to form a belief as to the truth of the allegations respecting Diaz' ethnic background or place of residence.

Fifth: Deny the allegations of paragraph 16a except (a) admit that the plaintiff, Malcolm K. Frasier, is black, and after passing an examination for the position of bus operator with MaBSTOA, was medically disqualified and denied appointment on March 14, 1973, and thereafter was again medically disqualified on April 12, 1973 for the

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position of bus cleaner and (b) deny they have knowledge or information sufficient to form a belief as to the allegations respecting Frasier's residence.

Sixth: Deny the allegations of paragraph 22 except admit that the Transit Authority applies to applicants for employment medical standards promulgated by the City Civil Service Commission after consultation with the Authority.

Seventh: Deny the allegations of paragraph 25 except admit that the Transit Authority and MaBSTOA do not employ persons who use or have a history of using narcotic drugs, including methadone. Rule 11(b) of the Rules and Regulations of the Transit Authority Governing Employees Engaged in the Operation of the New York City Transit System, provides as follows:

"Employees must not use, or have in their possession, narcotics, tranquilizers, drugs of the Amphetamine group or barbiturate derivatives or paraphernalia used to administer narcotics or barbiturate derivatives, except with the written permission of the Medical Director—Chief Surgeon of the System."

Eighth: Deny the allegations of paragraph 26 except admit that the Transit Authority and MaBSTOA screen applicants for employment for possible drug usage by means of medical examinations, including urinalysis, and, on a periodic basis, similarly screen certain classes of employees assigned to operating positions.

Ninth: Deny the allegations of paragraph 27 except admit that the plaintiff Carl A. Beazer was first employed

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by the Transit Authority as a Car Cleaner on May 11, 1960, was later promoted to the position of Conductor and on May 15, 1966 was promoted to the position of Towerman; that on or about August 31, 1971, the Medical Department of the Authority received a written report from the Veterans Administration Hospital in New York City indicating, among other things, that Beazer had a 15 year history of drug dependence and was then participating in the hospital's methadone maintenance treatment program; that he was suspended from duty on September 1, 1971 and on October 4, 1971, pursuant to §75 of the Civil Service Law of the State of New York, was charged with misconduct for violating the aforesaid Rule 11(b); that a hearing of the charges was conducted on November 3, 22 and 24, 1971, and the Hearing Referee recommended to the Authority that the charges be sustained and that Beazer be dismissed from service effective November 26, 1971; that prior to the Authority's acting upon the recommendation Beazer appealed to a three-member Impartial Disciplinary Review Board, established pursuant to agreement between the Transit Authority and the Transport Workers' Union of America, Local 100, which is the labor representative for nearly all of the Authority's hourly-paid employees, including employees in the title of Towerman; that the Review Board recommended to the Authority that the recommendation of the Hearing Referee be sustained and on August 15, 1972, the Transit Authority, acting by W. B. McLaren, its Executive Officer for Labor Relations and Personnel, adopted the recommendation of the Hearing Referee and Beazer was dismissed from the Authority's employ effective November 26, 1971. (Exhibit A annexed).

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Tenth: Deny the allegations of paragraph 28 except admit that the plaintiff Jose R. Reyes was first employed by the Transit Authority as a Maintainer's Helper on April 29, 1968 and was promoted to the position of Maintainer (Ventilation and Drainage) on July 5, 1970; that on November 1, 1971, Reyes was medically examined and screened for narcotic use resulting in medical findings of such usage; that he was suspended from duty on November 8, 1971 and on or about December 13, 1971 was charged with misconduct for using heroin and methadone in violation of the aforesaid Rule 11(b); that a hearing was held on January 19, 1972 and on or about January 21, 1972, the Hearing Referee recommended to the Authority that the charge be sustained and Reyes dismissed from service effective January 20, 1972; that the Authority by its Executive Officer, W. B. McLaren, approved the recommendation on September 29, 1972. (Exhibit B annexed).

Eleventh: Deny the allegations of paragraph 29 except admit that plaintiff Francisco Diaz passed an examination for the position of Maintainer's Helper given by the City Civil Service Commission on February 28, 1970; that he was denied appointment to such position by the Transit Authority upon medical findings of narcotic drug use; that Diaz appealed from such denial to the City Civil Service Commission which denied his appeal on September 23, 1970.

Twelfth: Deny the allegations of paragraph 30a except admit that the plaintiff Frasier passed examinations for the positions of Bus Operator and Bus Cleaner with

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MaBSTOA, and when it appeared during pre-employment processing that he was or recently had been a participant in a methadone maintenance program, he was informed by MaBSTOA's representative, Thomas L. Granger, Administrative Manager for Personnel, on March 14, 1973 and April 12, 1973, respectively, that he would not be appointed to the position of Bus Operator or Bus Cleaner because he did not meet the prescribed medical standards.

Thirteenth: Deny the allegations of paragraph 31 except admit that on or about May 7, 1971 the City Civil Service Commission, after consultation with the Transit Authority, promulgated "Medical Standards and Regulations for All Operations and Maintenance Positions, New York City Transit Authority," and the Court is respectfully referred to such document for its substantive provisions and the scope of its application.

Fourteenth: Deny the allegations of paragraphs 32, 33, 34, 35, 36, 37, 46, 48, 49, 50, 52, 53, 54, 58, 59, 60 and 61.

Fifteenth: Deny they have knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 40 except they admit that methadone maintenance is one of several modalities of treatment for narcotic addiction.

Sixteenth: Deny the allegations of paragraph 45 except admit that pursuant to Rule 31 of the Rules and Regulations Governing Employees Engaged in the Operation of the New York City Transit System, all persons, before they are appointed or promoted to positions in the Transit Authority, are required to submit to medical examinations

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to determine their medical fitness to perform the duties of the positions sought; that certain classes of operating employees are periodically examined to determine their medical fitness to perform the duties of the positions held by them, and at any time the Medical Director of the Transit Authority or the employee's department head may order or require an individual employee to submit to a medical examination if in his opinion such examination is indicated. The same requirements obtain in MaBSTOA.

Seventeenth: Deny they have knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 47 except admit that on or about March 22, 1972, the Department of Personnel of the City of New York published a document entitled "Personnel Policy and Procedure Bulletin" relating to City policy on the employment of ex-drug addicts, but that such policy and procedure are not applicable to the defendant Transit Authority or MaBSTOA.

Eighteenth: Deny the allegations of paragraph 51 except admit that under rules, regulations and working conditions of the Transit Authority and MaBSTOA a permanent employee who has a minimum period of two years service and is medically found to be permanently disqualified from performing the full duties of his position because of a non-service connected disability may, in the discretion of such Authority, be assigned to other work provided he is qualified therefor and such work is available, and a permanent employee of the Transit Authority who is disabled from performing the duties of his position as a result of using alcohol may, instead of

*Answer of Defendant New York City Transit Authority
and Related Defendants to Amended Complaint*

being dismissed on disciplinary charges, and provided he has at least three years of service, be invited to accept a program of counseling and therapy by such Authority, the charges being held in abeyance pending the outcome of such counseling; and an employee of MaBSTOA disabled from performing the duties of his position as a result of using alcohol will be dismissed subject to reinstatement provided he successfully cooperates with a similar counseling service maintained by MaBSTOA.

WHEREFORE, the defendants, New York City Transit Authority, William J. Ronan, William L. Butcher, Lawrence R. Bailey, Harold L. Fisher, William A. Shea, Eben W. Pyne, Leonard Braun, Justin N. Feldman, Donald H. Elliott, Frederic B. Powers, Mortimer Gleeson, Wilbur B. McLaren and Louis Lanzetta, demand judgment dismissing the complaint, with costs and disbursements.

JOHN G. DE ROOS

*Attorney for Defendants,
New York City Transit
Authority, et al.*

Office & P. O. Address
370 Jay Street
Brooklyn, N. Y. 11201
212-852-5000

EXHIBIT A
DISCIPLINARY DECISION

Date: August 15, 1972

Name of Employee: Carl A. Beazer

Title: Towerman

Pass No.: 053030

Department: Rapid Transit Operations—Div. A

After reviewing the record of the disciplinary hearing affecting the above named employee, I have adopted the recommendations made in the disciplinary procedure.

/s/ W. McLAREN
Executive Officer

for
Labor Relations and Personnel

FILE DISCIPLINE

W. Owens	Employee
L. Peterson	File

November 25, 1971

Daniel Gutman, Hearing Referee

New York City Transit Authority

Hearing of Charges Preferred Against

Carl A. Beazer—1165 E. 224th Street

Bronx, New York 10466

Towerman—Pass 053030—Rapid Transit Operations
Div. A

Exhibit A Annexed to Answer of Defendants

DATES OF HEARING: November 3, 1971 and November 22, 1971

Charged with Misconduct in possessing and using drugs, as is more particularly set forth in Exhibit #1 of the transcript of the hearing, which is attached hereto and made a part hereof.

Towerman Beazer was present at the hearing. He was represented by the Legal Aid Society, Myran Schonfeld, Esq., of Counsel. The Authority was represented by John G. de Roos, Esq., Joseph Warde, Esq. and Edward Summers, Esq., of Counsel. Respondent admitted that he had received the charges preferred against him. He denied the charges.

Towerman Beazer is 36 years of age and has been in service since May 11, 1960.

RECOMMENDATION: It is RECOMMENDED that the charges be SUSTAINED.

Respondent is charged with Misconduct in that he violated Rule 11(b) of the Rules and Regulations Governing Employees in the Operation of the New York City Transit System.

Rule 11(b) provides as follows:

"Employees must not use, or have in their possession, narcotics, tranquilizers, drugs of the Amphetamine group or barbiturate derivatives or paraphernalia used to administer narcotics or barbiturate derivatives, except with the written permission of the Medical Director—Chief Surgeon of the System."

Exhibit A Annexed to Answer of Defendants

It is alleged in the Specification that prior to June 21, 1971, Respondent possessed and used narcotic drugs; that he was and is on a drug treatment program; and that he is medically incompetent to perform the duties of his title.

Respondent is a Towerman, having been appointed to that position on May 15, 1966.

It was conceded that Respondent was a "prior" user of heroin. (Stenographer's minutes, page 3).

It was established that Respondent is currently on the Methadone Maintenance Program of the Veterans Administration Hospital. (Stenographer's minutes pages 4, 14)

Credible evidence was offered by the Chief of the Methadone Maintenance Program at Veterans Administration Hospital to the effect that Respondent remained in the Hospital for a period of six weeks; that he was discharged from the in-patient phase (of treatment) to the out-patient phase, which requires him to come back three times a week to pick up methadone; (Stenographer's minutes, page 15) that he has never missed coming in and picking up his Methadone; and that he is known to be complying with the program because urine samples are taken twice a week and tested. (Stenographer's minutes page 16)

It therefore must be concluded that Respondent is adhering to the program. He was described as "an excellent patient". (Stenographer's minutes page 17)

It is the Respondent's contention that because he is no longer a user of heroin and is on the Methadone Program, disciplinary discharge from employment is

Exhibit A Annexed to Answer of Defendants

unwarranted and that it is in violation of the due process clause of the State and Federal Constitutions.

The able lawyers for the Respondent and for the Authority presented a comprehensive and detailed discussion of the factors upon which each of the parties relies. The case is a serious one,—for the Authority, one of first impression. Accordingly, great latitude was extended in the admission of evidence in order that the record may be complete, even to the extent of exploring, by medical testimony, the position that make the Methadone Program a subject of some controversy. There was detailed, in behalf of the Respondent, the various steps which accompany or precede admission into the program, its claimed effects, the scientific bases upon which they rest, and the measure of success which is claimed for it.

The Authority's case was predicated upon reasons supporting its demand that Respondent be discharged from employment. It included testimony by physicians,—one the Medical Director of the Authority, which highlighted the controversy over this drug.

Of prime significance was the testimony of the Executive Officer for Labor Relations and Personnel Wilbur B. McLaren in which he discussed in thorough detail, the problems and policies which lead the Authority to conclude that it should not be required to continue the Respondent in its employ.

Of all the conflicting and opposing views expressed by the physicians who testified in behalf of either side, several facts stand out beyond dispute and must be deemed established. First, that the use of methadone creates a "block" against the desire or craving for

Exhibit A Annexed to Answer of Defendants

heroin. Second, that this "block" continues only as long as the patient continues in the Methadone Program. Third, that there can be no assurance of continued interest in and adherence to the program. Fourth, that the "block" is limited to the desire for heroin, and there is, consequently, no assurance that the subject will not turn to other narcotic drugs or alcohol. Fifth, that the program has its "drop-outs".

It is, of course, recognized that employment in gainful occupation is important to the Methadone patient, as it is to all able bodied persons who are attempting re-adjustment and rehabilitation. We must, however, consider the milieu for fulfillment of this need in proper perspective. Employment should be sought out and provided, but not in the service of a public agency which has the responsibility of running a railroad with operations of the size and magnitude of the Transit Authority.

These matters, however, were fully discussed by the persons most qualified to explain them, and by the official who is responsible for the operations of the Authority's personnel. In my considered judgment, the policy of the Authority, as enunciated by Mr. McLaren, is reasonable, and is necessary in the interest of the security of the Authority, and of public safety and confidence in the transit system.

During the course of the Hearing, decision was reserved on several objections, to evidence that was received. All such objections which were not ruled upon, are now over-ruled.

Having found charges sustained, I consulted this employee's disciplinary record. Said record is attached

Exhibit A Annexed to Answer of Defendants

hereto and made a part hereof. Employed since May 11, 1960, Respondent has had 8 Cautions and 3 Warnings. Five of the violations involved were functional.

It is accordingly RECOMMENDED that the charges be SUSTAINED and that Respondent be DISMISSED from the service effective as of the close of business on November 26, 1971.

Daniel Gutman
Hearing Referee

175/DG :smc

DECISION :

RECOMMENDATION APPROVED :

Executive Officer for
Labor Relations and Personnel

72A

EXHIBIT B

DATE January 21, 1972

FROM: Daniel Gutman, Hearing Referee
TO: New York City Transit Authority
SUBJECT: Hearing of Charges Preferred Against
Jose Reyes—12-11 31st Avenue
Astoria, New York 11102
Ventilation & Drainage Maintainer—Pass
741617
Mtce. of Way Dept.

19 JJF

DATE OF HEARING: January 20, 1972 \$5.2425

Charged with Misconduct in using narcotic drugs without the permission of the Authority's Medical Director, as is more particularly set forth in Exhibit #1 of the transcript of the hearing, which is attached hereto and made a part hereof.

Ventilation and Drainage Maintainer Reyes was present at the hearing. He was represented by Community Action for Legal Services, Inc., Richard J. Hibler, Esq., of Counsel. The Authority was represented by John G. de Roos, Esq., Joseph Warde, Esq., of Counsel. Respondent admitted that he had received the charges preferred against him. He admitted the charges.

Ventilation and Drainage Maintainer Reyes is 26 years of age and has been in service since April 29, 1968.

73A

Exhibit B Annexed to Answer of Defendants

RECOMMENDATION: It is RECOMMENDED that the charges herein be SUSTAINED.

The evidence proved the charges.

Having found charges sustained, I consulted this employee's disciplinary record. Said record is attached hereto and made a part hereof. Employed since April 29, 1968, Respondent has had 2 Departmental Hearings (1969, 1970).

It is accordingly RECOMMENDED that the charges be SUSTAINED and that *Respondent be DISMISSED from the service effective as of the close of business on January 20, 1972.*

/s/ DANIEL GUTMAN
Hearing Referee

FEB 2 1972

175/DG:emc

DECISION:

RECOMMENDATION APPROVED:

/s/ W. McLAREN
Executive Officer for
Labor Relations and Personnel

SEP 29 1972

**Compilation of the Agreed to and Contested Facts
Together with Plaintiffs' Submission Regarding
Documentation Contained in the Record and Up-
date Thereto (Plaintiffs' Exhibits 31 and 31A)**

• • • • •

Plaintiffs will set forth herein the parties' proposed findings regarding the facts relevant to this case, numbered in accordance with the documents previously submitted to the Court, together with an indication with respect to each as to:

- 1) whether the parties have agreed and:
 - a) if so, the language upon which they have agreed;
 - b) if not, the respective parties' positions as contained in the proposed findings and responses thereto submitted to the Court to date;
- 2) the evidence supporting plaintiffs' position contained in the proceedings to date including specifically the depositions, defendants' answers to plaintiffs' interrogatories, documents produced in response to plaintiffs' requests for production of documents, and transcripts of previous proceedings.

Plaintiffs submit herewith in separate volumes:

- 1) The depositions, with those portions plaintiffs wish to offer into evidence bracketed and underlined in red; and those portions of which defendants wish to rely underlined in blue;
- 2) The documents we wish to offer into evidence as exhibits, numbered in order. (These documents shall

Compilation of the Agreed to and Contested Facts

be referred to herein as PX) (Included among these documents are the interrogatories and responses thereto.)

Except as indicated below, the City defendants have agreed to all plaintiffs' proposed findings insofar as they affect the City.

• • • • •

II. DEFENDANTS

Plaintiffs and defendant TA are agreed on the following findings:

2. Defendant New York City Transit Authority* (hereinafter "TA") exists pursuant to the laws of the State of New York as a public benefit corporation performing a governmental function. It has as its purpose, *inter alia*, the operation of the subway system and certain bus lines in New York City.
3. Defendant Manhattan and Bronx Surface Transit Operating Authority (hereinafter "MaBSTOA") exists pursuant to the laws of the State of New York as a public benefit corporation and subsidiary corporation of defendant New York City Transit Authority. It has as its purpose, *inter alia*, the operation of certain bus lines in New York City.
4. Defendant William J. Ronan served as a member of the New York City Transit Authority, as a director

* Except as specifically differentiated, the facts stated herein with respect to the defendant New York City Transit Authority are true also with respect to the defendant Manhattan and Bronx Surface Transit Operating Authority.

Compilation of the Agreed to and Contested Facts

of Manhattan and Bronx Surface Transit Operating Authority, and as the chairman of the New York City Transit Authority and the Manhattan and Bronx Surface Transit Operating Authority, from March, 1968 until May, 1974. During that period, defendant Ronan also served as chief executive officer of both the TA and MaBSTOA and, as part of his duties in those positions, bore overall responsibility for the appointment, discipline and removal of all employees. Defendant Ronan personally reviewed the policy with respect to the employment of former drug abusers and approved its continuance.

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8. Defendant Wilbur B. McLaren is Executive Officer in charge of labor relations and personnel for the TA and has served in that position since 1969. As part of the duties of his position McLaren bears operational responsibility for the appointment, discipline and removal of all TA employees, in accordance with the New York Civil Service Law and the rules and regulations of the New York Civil Service Commission and the rules and regulations of the TA. McLaren is consulted with respect to the formulation and revision of policies relating to the appointment, discipline and removal of TA employees, when such formulation or revision may occur.

With respect to this para. 8, plaintiffs proposed in addition the following finding, with which the TA has not agreed:

Defendant McLaren has personally approved the TA's policy with respect to the employment of former drug

Compilation of the Agreed to and Contested Facts

abusers and he has been responsible for its administration.

In support of this finding plaintiffs submit McLaren Dep. I, TR. 22* ["I probably played a major role" in formulating or continuing the TA's present drug policy]; see generally portions of McLaren Dep. TR. I and II submitted by plaintiffs. Plaintiffs and defendant TA are agreed on the following findings:

9. Dr. Louis Lanzetta is medical director of the TA and has served in that position since 1970. As part of the duties of his position, Dr. Lanzetta is responsible for the administration of the policy with respect to the employment of former drug abusers insofar as it requires an assessment of the drug abuse histories of specific persons. Dr. Lanzetta has approved the policy and recommended to defendant McLaren that it be continued.
10. The appointment, promotion and in certain instances the continuance of the service of all TA employees is governed by the provisions of the Civil Service Law of the State of New York and the Rules of the City Civil Service Commission. Rules of the TA regulating the conduct of its employees are adopted and promulgated by the Board which constitutes the TA. Defendant New York City Civil Service Commission is responsible, pursuant to the laws of the New York State, for the promulgation and enforcement of

* When there is more than one deposition transcript of a single witness they are designated herein as "I" or "II".

Compilation of the Agreed to and Contested Facts

rules governing the appointment, promotion and in certain instances the continuance of employment of all TA employees. The Civil Service Commission may hear appeals by applicants for employment who are medically disqualified by the TA, which acts for the Department of Personnel in conducting medical examinations of eligibles certified to the TA by the Department. It may also hear appeals pursuant to Section 76 of the Civil Service Law by employees subjected to discipline by the TA.

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III. THE DRUG POLICY

A. GENERALLY

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17. Plaintiffs submitted the following proposed finding with which the TA did not agree:

Approximately 5% of the persons certified eligible for TA employment are rejected because it is discovered that they are drug-free former addicts or former heroin addicts successfully participating in duly licensed and authorized methadone maintenance programs.

The TA admitted in their response that about 4½% were disqualified but limited this to persons disqualified for *present* drug use. Plaintiffs submit that the TA must be bound by the following admission made in its proposed findings of fact dated September 26, 1974, which its counsel reaffirmed both in discussions with plaintiffs on October

Compilation of the Agreed to and Contested Facts

3, 1974, and during a conference with the Court on October 4, 1974:

About 4½% of the persons certified to the TA by the Civil Service Commission of the City of New York as eligible for employment are not employed because of present illicit drug use or a history of such use. (TA proposed finding No. 21 of September 26, 1974 proposed findings).

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18. Plaintiffs and the TA are agreed on the following finding:

The TA has never studied the requirements of particular TA jobs or groups of jobs to determine the present ability of persons with a prior history of drug abuse, including persons participating in methadone maintenance programs, to perform the various jobs.

Plaintiffs have proposed the following additional finding to which the City defendants have agreed and as to which the TA has not indicated its position:

No other person or organization including the New York City Civil Service Commission or the New York City Department of Personnel has ever studied the requirements of particular TA jobs or groups of jobs specifically to determine the present ability of persons with a prior history of drug abuse, including persons participating in methadone maintenance treatment programs, to perform the various jobs.

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Compilation of the Agreed to and Contested Facts

19. Plaintiffs and the TA are agreed on the following finding:

The TA has not made any studies to determine the job performance of TA employees with prior histories of drug abuse, including employees participating in methadone maintenance programs.

In addition, plaintiffs have proposed the following finding to which the City defendants have agreed and as to which the TA has not indicated its position:

No other person or organization, including the New York City Civil Service Commission or the New York City Department of Personnel has made any studies to determine the job performance of TA employees with prior histories of drug abuse including employees participating in methadone maintenance treatment programs.

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21. Plaintiffs and the TA are agreed on the following findings:

The following physicians who are experts in the field of drug treatment were consulted by the TA with respect to the employability of persons with prior histories of drug abuse, including persons participating in methadone maintenance treatment programs:

a. Dr. Harvey Gollance, Director of the Beth Israel Medical Center, has told officers and employees of the TA, including defendant Louis Lanzetta, the Medical Director, and defendant Wilbur McLaren, the Executive Officer for Labor Relations and Personnel, that in

Compilation of the Agreed to and Contested Facts

his opinion some methadone maintenance treatment program participants are qualified to be TA employees in some positions.

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b. Dr. Harold Trigg, Chief of the Methadone Maintenance and Drug Addiction Services at the Beth Israel Medical Center, Associate Professor of Clinical Psychiatry at Mt. Sinai School of Medicine, and special consultant to the TA on drug abuse, has told officers and employees of the TA including defendant Louis Lanzetta, the Medical Director, and defendant Wilbur McLaren, the Executive Officer for Personnel, that in his opinion some methadone maintenance treatment participants are qualified to be TA employees in some positions, and that he would be willing to screen methadone maintenance program participants to find persons suited for TA employment and help the TA devise a system to monitor the performance of these individuals. Dr. Trigg specifically recommended to the TA that it employ plaintiff Diaz.

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c. Dr. Vincent Dole, Professor of Medicine at the Rockefeller University and Senior Physician to the Rockefeller University Hospital, has told officers and employees of the TA, including Louis Lanzetta, the Medical Director, and Wilbur McLaren, the Executive Officer for Labor Relations and Personnel, that in his opinion some methadone maintenance treatment program participants are qualified to be TA employees in some positions.

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Compilation of the Agreed to and Contested Facts

22. Plaintiffs and the TA are agreed on the following finding:

According to the testimony of responsible TA officials, the TA has never had an accident found to be caused by drug use on the part of a TA employee, or to have been caused by a TA employee who was a person with a prior history of drug abuse or a participant in a methadone maintenance program.

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The TA has submitted the following additional proposed finding:

Instances have occurred, including one on August 19, 1974, where a conductor, later found to be using heroin, opened the doors of a train on the wrong side, and another on 8/1/73 when a passenger was struck by a train and became wedged between the platform and one of the cars. The train was operated by a motorman found to be using cocaine.

Plaintiffs have no information with respect to defendants' additional proposal, because of defendants' failure to make complete discovery.

In addition, plaintiffs have proposed the following finding:

With respect to the "instances" referred to by defendants, there was no indication whatsoever that the employees involved were drug-free former addicts or successful participants in duly licensed and authorized methadone maintenance treatment programs.

Compilation of the Agreed to and Contested Facts

23. Plaintiffs and the TA are agreed on the following finding:

One of the reasons for the TA drug policy is the fact that the TA feels an adverse public reaction would result if it were generally known that the TA employed persons with a prior history of drug abuse, including persons participating in methadone maintenance programs.

B. RELATIONSHIP TO CITY POLICY

24. Plaintiffs proposed the following findings:

On the basis of a study of the employability of ex-addicts, the New York City Department of Personnel and the New York City Civil Service Commission promulgated the following policy on the employment in mayoral agencies of ex-addicts:

A history of drug addiction shall not in itself constitute a bar to employment in any City position except [in the uniformed services].

Accordingly, "drug-free former addicts" and persons "successfully participating in recognized chemotherapeutic treatment programs" such as methadone maintenance are fully eligible for employment in all positions in the mayoral agencies, and are to be considered for such employment on the same basis as other persons. Furthermore, drug-free former addicts and persons participating in duly licensed and authorized methadone maintenance treatment programs are not in fact absolutely excluded for all positions of employment in the uniformed services.

Compilation of the Agreed to and Contested Facts

While the TA has admitted only that the policy was promulgated, it has not denied the other propositions contained in the above. In any event, since the City has agreed to the above propositions in their entirety, and the matters are clearly within the City's knowledge, they must be accepted as beyond dispute.

The City defendants have additionally proposed the following finding to which plaintiffs have agreed and the TA has indicated no position:

Persons hired pursuant to the City's policy with respect to the employment of former addicts are not separately monitored by the Civil Service Commission and Department of Personnel in their job performance and in the fact are wholly integrated into the work force.

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25. Plaintiffs and the TA have agreed to the following findings:

"City-wide titles" of employment are used to designate those job positions in which civil service employees perform essentially the same tasks regardless of the specific governmental agency in which they are employed. Examples of city-wide titles are secretary, stenographer, clerk and motor vehicle operator. About 3,400 of the TA workforce of 42,500 are in city-wide titles.

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Compilation of the Agreed to and Contested Facts

C. ADMINISTRATION OF THE TA DRUG POLICY

26. Plaintiffs and the TA are agreed on the following finding:

The TA policy with respect to the employment of former drug abusers is administered by means of a program, initiated in 1970, under which medical examinations, including urine analyses, designed to detect the use of drugs, are administered on a periodic basis to some TA employees and applicants for employment

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b. Bus operators, conductors and motormen are physically examined every 2 years if under 50 years of age and every year if over 50 years of age. Towermen and Surface Line Dispatchers are examined every 5 years. If under 35 years of age all are given drug-detection urinalyses at the time of their physical examinations.

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c. All TA employees under age 35 are given drug-detection urinalyses as part of promotional medical examinations required by the TA.

Other than the above mentioned examinations, TA employees and prospective employees are not routinely examined for symptoms of drug abuse, although any department in the TA may require a TA employee to

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undergo a physical examination at any time if such is indicated.

27. Plaintiffs and the TA are agreed on the following finding:

TA employees showing physical manifestations of drug abuse other than the definite presence of morphine or methadone or other illicit drug in the urine, are referred for consultation to Dr. Harold Trigg of Beth Israel Medical Center, who reports his impression to the TA whether the individual is abusing or has abused drugs. The TA accepts Dr. Trigg's impression of the case.

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The TA has submitted the following finding:

Prospective employees are generally not referred to Dr. Trigg, except in some situations where marijuana or prior drug use is suspected or admitted.

Plaintiffs agree that this was true in the past, but submit the following finding:

Since the summer of 1974, prospective TA employees showing physical manifestations of drug abuse other than the definite presence of morphine or methadone or other illicit drug in the urine have also been referred for similar consultation with Dr. Trigg.

Dr. Trigg admitted this fact in a conversation with plaintiffs' counsel on October 11, 1974.

Compilation of the Agreed to and Contested Facts

IV. NATURE OF TA EMPLOYMENT

A. OVERVIEW

28. Plaintiffs and the TA are agreed on the following findings:

The TA employs about 40,000 persons in both operating and non-operating positions (exclusive of the transit police). MaBSTOA employs about 6,500 persons. The TA hires about 2,500 new employees annually and MaBSTOA about 500.

Beyond this there is no agreement. Plaintiffs have submitted the following finding:

The TA employs large numbers of both operating and non-operating personnel who perform widely varied but typical industrial and office keeping tasks such as clerical, secretarial, maintenance, and mechanical work.

In support plaintiffs submit the list of job titles in the TA furnished to plaintiffs by the TA defendants which reveals that the TA employs large numbers of persons in such titles as account clerk (25 persons); administrative assistant (97 persons); assistant civil engineer (207 persons); attorney (22 persons); bookkeeping machine operator (9 persons); car cleaners (955 persons); cashier (106 persons); civil engineer draftsman (27 persons); claim examiner (33 persons); clerk (563 persons); collecting agent (145 persons); electrical engineering draftsman (47 persons); junior engineers (99 persons); keypunch operator (57 persons); messenger (12 persons); police

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administrative aid (30 persons); railroad clerk (cashier) (4,414 persons); railroad porter (janitor) (1,162 persons); senior clerk (286 persons); stenographer (93 persons); telephone operator (39 persons); turnstile maintainer (141 persons). See PX 12.

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30. Plaintiffs have submitted the following proposed finding as to which the TA has not agreed:

TA job positions vary widely with respect to the potential safety impact on the riding public of TA employees of improper performance by persons in those positions. Approximately 75 percent of all TA jobs are not directly related to the safety of passengers or TA employees, and about half of all TA jobs do not involve direct dealings with the public or the technical or mechanical operations of trains.

In support of this see generally No. 28, *supra*. In addition Plaintiffs submit the following:

Defendant McLaren specifically admitted that no more than *half* of the jobs *on* TA property (thus excluding various clerical, maintenance and other off-property jobs) were related to passengers' safety or to other employees' safety, noting as specific examples of non-safety-related or "non-critical" positions the following: car maintainers, car cleaners, railroad clerks and railroad porters (indicating that of course there might be certain specific jobs within these titles that could involve more critical work) McLaren Dep. II TR 135-37. Thus when the off-property jobs are taken into account it is clear from McLaren's own admis-

Compilation of the Agreed to and Contested Facts

sions that well over half the jobs with the TA are not safety-related.

McLaren further admitted in discussing the categories of persons to whom periodic physicals were given (limited to: bus operators, conductors and motormen who receive exams every 2 years; towermen and surface line dispatchers who receive exams every 5 years) that the degree of safety sensitivity was a criterion in determining the categories (McLaren Dep. I TR 51-52). He did indicate that he felt the periodics should be expanded to other groups but only to those "working around the tracks or in controlling or directing our equipment" (McLaren Dep. I TR 52). He testified that roughly one-third of the employees *in TA titles* were now covered by the periodics and that if periodics were extended to all the titles he felt should be covered only about one-half the employees *in TA titles* would be covered (McLaren Dep. TR 58). He clearly admitted that city-wide titles did not involve safety:

"Q. Are any periodic medical examinations given to any persons in City wide titles?

A. No. They are only given to those involved in critical jobs effecting the safety and service of our system." (McLaren Dep. I 51)*

The TA's policies regarding alcohol, diabetes, epilepsy and physical disabilities, as well as use of such drugs as amphetamines (see generally proposed and agreed to findings Nos. 44-57, *infra*, and plaintiffs' supporting documentation) demonstrate conclusively that the TA has concluded

* Lanzetta testified that with regard to medical conditions other than drug use the TA applied a "more lax" medical standard in screening persons for city-wide titles (Dep. TR 94-95).

Compilation of the Agreed to and Contested Facts

that TA job positions vary widely with respect to the potential safety impact on the riding public or TA employees of improper performance by persons in these positions.

Warren, the Director of the TA's alcoholism program, testified that alcoholics might be transferred to, for example, platform conductor positions because a platform conductor "is not in a position here to jeopardize the safety of our passengers . . ." (Dep. TR 18-19). As examples of other non-critical positions he mentioned: maintenance shop positions, railroad clerks, railroad porters, caretakers, watchmen, ventilation and drainage maintainers, turnstile maintainers (Dep. TR 19). See also Warren Dep. TR 59-60. He stated that none of the clerical jobs would be considered critical (Dep. TR 19). (See also testimony supporting proposed finding 44-46, indicating that epileptics and diabetics are allowed to fill these kinds of positions even if their medical conditions are severe; if their conditions are under control they may hold any TA position.)

Warren testified that for purposes of the alcoholic program about 60 percent of jobs in TA titles might be considered critical and 40 percent non-critical (Dep. TR 59), and subsequently testified that by critical he meant any position which might involve "a possible threat to the riding public" or "where his drinking may be a dangerous situation to his fellow employees . . ." (Dep. TR 70).

Moreover, Warren testified that graduates of his program had successfully been employed in "every position in the Authority," including that of Towerman (Dep. TR 27) and positions dealing with high voltage (*ibid.*). He testified that alcoholics in positions such as motorman and trainmaster had participated in his program on a confidential basis (Dep. TR 27-29). See also Warren Dep. TR 57.

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Ronan testified that he had had no reasons to conclude that the alcoholism program endangered the riding public and, indeed, that it had received general commendation (Ronan Dep. TR 12-14).

McLaren similarly testified that it was a "very good operation" (Dep. I TR 23).

Two members of the Transit Authority Board, defendants Lawrence R. Bailey and Justin N. Feldman, testified that TA titles varied widely with respect to safety considerations and that not all were safety-related (Bailey Dep. TR 7-8; Feldman Dep. TR 17-18).

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B. HIRING PROCEDURES

32. Plaintiffs and the TA are agreed on the following finding:

TA employees are hired on the basis of a competitive written examination, medical examination and personal interview. Although the written examination is officially prepared by the Civil Service Commission, the TA contributes both money and personnel to the Commission for such preparation and consults with the Commission with respect to the examination. A prospective TA employee is not called down for a medical examination and interview until he has been notified that he has passed the written examination.

Plaintiffs have additionally proposed the following finding to which TA defendants have not agreed but to which

Compilation of the Agreed to and Contested Facts

City defendants (who have the responsibility for giving examinations) have agreed:

Examinations for the TA job titles that have the greatest number of employees may be given as frequently as once a year. (See Shanen Dep. TR 29)

33. Plaintiffs and the TA are agreed on the following finding:

The individual medical standards for employment in TA titles are prepared and promulgated by the Civil Service Commission. The TA is customarily consulted in this matter by the Commission.

Plaintiffs have proposed the additional finding as to which the TA does not agree (but the City does):

The general medical standards for TA employment in TA titles are prepared by the TA and submitted to the Civil Service Commission, which officially promulgates them.

.

The City has agreed . . . that:

No study of former addicts including persons maintained on methadone has been conducted to determine their ability to perform the specific duties associated with TA titles of employment.

Plaintiffs have also submitted the following proposed finding:

In connection with the instant litigation the City defendants indicated that they were prepared to initiate a

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study which would for the first time have assessed the nature of the various TA positions with a view toward determining the ability of methadone maintained former drug addicts to perform in the different positions. Such a study has not in fact been commenced.

C. DISCIPLINARY PROCEDURES

39. Plaintiffs and the TA are agreed on the following finding:

No TA employee covered by § 75 of the New York Civil Service Law can be dismissed or suspended from his position without a hearing, which may take place either within a TA department or before an official TA trial board. Both hearing bodies may impose sanctions ranging from an informal "warning" or "caution" to a formal written "reprimand" to suspension. No more than a three day suspension may be imposed at a Departmental Hearing, while longer suspensions and dismissals may be imposed at a Trial Board Hearing. Decisions of TA hearing bodies are either accepted, modified or rejected by the TA's Executive Officer for Labor Relations and Personnel.

40. Plaintiffs and the TA are agreed on the following finding:

A TA employee may be "warned" or "cautioned" by his department without any hearing procedure. A TA employee can remain in good standing even if he has some "warnings" or "cautions" in his record.

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41. Plaintiffs and the TA have agreed to the following finding:

Decisions resulting from the TA Trial Board may be appealed to an "Impartial Review Board" made up of representatives of the TA and the Transport Workers Union. The Impartial Review Board may recommend to the Executive Officer for Labor Relations and Personnel how he should exercise his power to accept, modify or reject those decisions.

42. Plaintiffs and the TA have agreed to the following finding:

Actions of the Executive Officer for Labor Relations and Personnel may be appealed to City Civil Service Commission, or, alternately, to the courts.

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D. POLICY WITH RESPECT TO PHYSICAL DISABILITIES AND ALCOHOLISM

44-46. Physical Disabilities

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45. Plaintiffs and the TA are agreed on the following finding:

The TA does not maintain a blanket rule barring the hiring in any capacity of persons with a history of diabetes, epilepsy or heart disease. Instead, it is the policy of the TA to consider the hiring of such persons on an individual basis in light of such factors as their actual performance capabilities and the safety sensitivity of the job to which they seek appointment.

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Diabetics, epileptics and persons with heart disease have been knowingly hired by the TA.

46. Plaintiffs have proposed the following finding:

Persons who have been employed by the TA for over 2 years and who are discovered for the first time to have diabetes, epilepsy or heart disease are continued in TA employment. The TA makes an individual assessment of their actual performance capabilities to determine in which TA positions they are capable of performing without impairing the safety of the riding public or other TA employees. In accord with their capabilities, such persons are then allowed to retain their current position of employment or to transfer to a less sensitive position or a light duty position. While assignment to light duty theoretically depends on the availability of light duty positions, no person has ever been discharged from TA employment due to diabetes, epilepsy or heart disease due to the unavailability of such positions.

The TA has agreed with the following exception:

Transfer to a less sensitive or light duty position is only made where a vacancy is available.

Plaintiffs do not agree to the above and have proposed the following additional finding:

There are sufficient vacancies on a regular basis to allow for the re-assignment of persons suffering from diabetes, epilepsy or heart disease to light duty positions.

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*Compilation of the Agreed to and Contested Facts**47-56. Alcoholism Policy*

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48. Plaintiffs and the TA have agreed to the following finding:

The TA does not maintain a blanket rule barring the hiring in any capacity of persons with a prior history of alcoholism. Instead, it is the policy of the TA to consider the hiring of such persons on an individual basis in light of factors such as their rehabilitation and the safety sensitivity of the job to which they seek appointment. Persons with prior histories of alcoholism have been knowingly hired by the TA.

49-51.

49. Plaintiffs and the TA have agreed to the following finding:

Rule 11(a) of the TA Rules and Regulations prohibits TA employees from drinking alcoholic beverages during their tours of duty or at any time to an extent making them unfit to report for duty or to be on duty. Violation of Rule 11(a) does not, however, result in automatic dismissal from the TA's employ, even if the offending employee is an alcoholic. If a TA employee is accused by a supervisor of being in violation of Rule 11(a), he is subjected to disciplinary proceedings, the nature of which relates to the safety sensitivity of the job position that he holds.

Plaintiffs have submitted the following findings 50-51:

50. Persons in job positions that do not directly relate to passenger or employee safety face proceedings

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at the Departmental level for a first violation of Rule 11(a). The maximum penalty that can result after such proceedings is a three day suspension from duty. Persons disciplined at the Departmental level for violation of Rule 11(a) are customarily allowed to remain in their job positions. Approximately 60% of the TA's job positions are considered non-safety sensitive for the purposes of enforcing Rule 11(a).

51. Persons in job positions that relate directly to passenger or employee safety face proceedings at a Trial Board level for a first violation of Rule 11(a). Persons who have previously been disciplined at the Departmental level for violating Rule 11(a) may also be summoned before the Trial Board for subsequent violations. Although the Trial Board may impose dismissal from TA employment as a penalty for violating Rule 11(a) it rarely does so the first time Rule 11(a) violators appear before it. Even in those instances when the Trial Board determines that the severe penalty of dismissal is warranted, that penalty is usually held in abeyance pending an opportunity for the offending employee to participate in the TA Employee Counseling Service. Persons in safety sensitive positions who have been summoned before the Trial Board for violating Rule 11(a) are usually required to accept a demotion to a non-safety position as a condition of continued TA employment.

The TA has indicated substantial agreement with plaintiffs' proposed 50-51 in its proposed counter-finding No. 49. Plaintiffs agree with the TA's proposed counter-find-

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ing only insofar as set forth below and only with the additions and qualifications bracketed below.

A violation of Rule 11(a) of the TA's rules prohibiting employees from drinking alcoholic beverages during their tour of duty or at any time to an extent making them unfit to report for or be on duty [may] result in disciplinary action against the employee, including [, in some instances] suspension and dismissal.

If such an employee has less than three years of service and holds a [safety sensitive] position in which he is directly engaged in operations, such as Motorman, Conductor or Bus Operator, he [may] be dismissed. If he holds a position [that does not relate directly to passenger or employee safety] a hearing [may] be given him either at the departmental level or trial board level, depending on all the circumstances of the case, and discipline may be imposed including [in some instances] suspension and dismissal.

If the employee violating Rule 11(a) has more than three years of service and holds an operating position, he [may] be demoted from that position. If he holds a non-[safety sensitive] position, he [may] be given a hearing at either the departmental level or trial board level, depending upon all of the circumstances of his case, and is subject to discipline, but less than dismissal for a first offender.

[Persons in job positions that do not directly relate to passenger or employee safety face proceedings at

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the Departmental level for a first violation of Rule 11(a). The maximum penalty that can result after such proceedings is a three day suspension from duty. Persons disciplined at the Departmental level for violation of Rule 11(a) are customarily allowed to remain in their job positions. Approximately 60% of the TA's job positions are considered non-safety sensitive for the purposes of enforcing Rule 11(a).]

In addition to discipline [an] employee [found in violation of Rule 11(a)] [may] be referred by his department to the TA's Employee Counselling Service, which provides counselling and other aid to employees who have drinking problems. An employee may also voluntarily seek such services. If he has a problem, he is invited to participate in the services of the program, including regular reporting and faithful participation in an established AA program not conducted by the TA. In a few cases depending on the circumstances the disciplinary penalty that is imposed for the violation, except demotion in the case of operating employees, may be reserved by the Hearing Officer contingent upon the employee's continued cooperation with the counselling service. [The disciplinary penalty held in reserve may include as severe a penalty as dismissal.]

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52. Plaintiffs and the TA are agreed to the following findings:

The Employee Counseling Service is an organization that has existed for over 18 years within the TA to

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provide assistance for problem drinkers employed by the TA. All persons found in violation of Rule 11(a) are referred to the Counseling Service. If the Service determines that persons referred to it have alcoholism problems, they are invited to participate in the Service's program. That program requires consistent attendance at a specified number of Alcoholics Anonymous meetings, as well as regular reporting to the Counseling Service. The success rate of the TA Employee Counseling Service Program is only approximately 60%, since some participants have relapses into drinking and some employees referred to the program drop out or refuse to participate. Nevertheless, persons who do not succeed in the TA Employee Counseling Program are allowed to continue in the employ of the TA as long as their on-the-job performance remains adequate. The TA makes no inquiry into its employees' use of alcohol off the job as long as such use does not impair their functional capabilities during their tour of duty with the TA.*

Employees not remaining in the program are not for that reason subject to any discipline.

53. *Plaintiffs and the TA are agreed on the following finding:*

TA employees who have not been found to have been in violation of Rule 11(a), but who have problems with

* Thus McLaren testified specifically that the TA made no attempt to screen its workforce to determine whether persons had drinking problems but, rather, looked solely to job performance. McLaren Dep. II TR 142.

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alcoholism, may enroll in the Employee Counseling Service on a confidential basis. Such enrollment is not reported to the employees' supervisors, and they are not required to accept a demotion in position, even if their current position is safety sensitive. Persons have enrolled in the Counseling Service on a confidential basis while serving in such highly sensitive positions as motormen, towermen, dispatchers, and trainmasters.

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54. *Plaintiffs and the TA are agreed on the following finding:*

About 20% of the persons participating in its alcoholism program are doing so on a voluntary and confidential basis.

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55. *Plaintiffs submitted the following proposed finding:*

A TA employee who has been demoted due to an alcoholism problem and violation of Rule 11(a) is generally eligible for restoration to a safety sensitive position after three years of successful participation in the Counseling Service Program. In exceptional cases the three year requirement may be waived. Over the years substantial numbers of persons from the Counseling Service Program have been restored to safety sensitive positions. Many of these persons have been eligible for and received subsequent promotions.

The TA has not agreed with this in its entirety but has agreed to the following which is included within plaintiffs' proposed finding:

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An employee demoted for a violation of Rule 11(a) may be restored to an operating position after three years of full cooperation with the counseling service.

• • • • •

57. Plaintiffs and the TA are agreed on the following finding:

Some employees who may be taking amphetamines under the supervision of and prescribed by a physician may continue to do so with the written permission of the medical director depending upon all the circumstances.

• • • • •

VII. RACIAL IMPACT

69-71

There is no agreement between plaintiffs and the TA as to Nos. 69-71. Plaintiffs' proposed findings are set forth below:

69. The population of former drug abusers in the New York Standard Metropolitan Statistical Area contains a substantially and significantly greater proportion of Blacks and Hispanics than the civilian workforce at large for the New York Standard Metropolitan Statistical Area. Hence, the probability of a Black or a Hispanic person being denied employment by the TA on the basis of its policy respecting the employment of former drug abusers is substantially and significantly higher than the same probability for his white counterpart.

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70. The population of former drug abusers who have been dismissed by the TA on the basis of its policy respecting the employment of former drug abusers have been overwhelmingly Black and Hispanic, and disproportionately Black and Hispanic as compared with the racial and ethnic composition of the general TA workforce. The population of former drug abusers now working for the TA who will be dismissed upon discovery by the TA on the basis of its policy respecting the employment of former drug abusers is overwhelmingly Black and Hispanic, and disproportionately Black and Hispanic as compared with the racial and ethnic composition of the general TA workforce. Hence, the probability of a Black or Hispanic TA employee being dismissed from TA employment on the basis of the TA's policy with respect to the employment of former drug abusers is substantially and significantly higher than his white counterpart.

71. The TA's policy with respect to the employment of former drug abusers has a significant and substantial discrimination impact upon Black and Hispanic persons otherwise eligible to commence employment with the TA or to continue in its employ.

In support of the above proposed findings Nos. 69-71, plaintiffs have submitted the following findings 71(a)-(c), as to which the TA has not indicated its position.

71(a). The racial breakdown of TA employees referred to Dr. Trigg pursuant to the arrangement described in paragraph 27, *supra*, is as follows:

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Black	72.2%
Hispanic	9.3%
White	18.5%

(In support, plaintiffs submit herewith PX 20.)

71(b). Statistics available from the United States Department of Commerce, Bureau of the Census indicate that the civilian workforce* for the New York Standard Metropolitan Statistical Area** is approximately 15.0% Black and 5.1% Hispanic.† The racial composition of this population can be assumed to approximate the racial composition of the population eligible for employment with the TA and MaBSTOA save for their policy of excluding all present and past methadone maintenance program participants.

71(c). The methadone maintenance population, essentially a sub-group of the civilian workforce, is approximately 38.5% Black and 22.5% Hispanic.†† It has been

* "Civilian workforce" is defined by the Bureau of the Census to include all non-military persons who are either employed, or looking for and available to accept employment.

** "Standard Metropolitan Statistical Area" (SMSA) is a designation utilized by the Bureau of the Census. Counties contiguous to a county or counties containing a city of 50,000 persons or more are included in a SMSA if, according to criteria established by the Bureau of the Census, they are socially and economically integrated with the central city. The New York SMSA includes New York City and Westchester, Rockland, Nassau and Suffolk Counties. It comprises the area from which the TA and MaBSTOA can reasonably be expected to draw their 49,000-51,000 employees.

† See 1970 Census of Population, Vol. 1—Characteristics of the Population, Part 34—New York, Section 2 Tables 164 and 165.

†† Records regarding the ethnic composition of the methadone maintenance population are maintained by the Rockefeller Univer-

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reliably estimated that active heroin addicts are 60-70% Black or Hispanic.*

In further support of proposed findings 69-71, plaintiffs submit Dr. Lanzetta's testimony that approximately 75-80% of the persons dismissed from TA employment because of drug use were Black or Hispanic (Lanzetta Dep. TR 79-80), and that, while he was uncertain as to the racial percentages of applicants denied TA employment because of drug use he was certain that the majority were Black or Hispanic (Dep. TR 84).

These statistics together with the statistics cited *supra*, paras. 71(a)-(c), constitute the best statistics currently available to plaintiffs on the actual impact of the TA's drug policy on plaintiffs' class because of defendant TA's refusal to respond to plaintiffs' requests on discovery for *either*:

(1) The exact racial statistics on TA applicants and employees denied or dismissed from employment for drug-related reasons; or

(2) The records of TA applicants and employees denied or dismissed from employment for drug-related reasons. These records would have permitted

sity Methadone Information Center. Under contract to the New York State Drug Addiction Control Commission, the center is responsible for gathering extensive information concerning methadone maintenance in the New York City metropolitan area. In a letter dated August 27, 1974, addressed to counsel for plaintiffs a responsible official of the Center confirmed the racial/ethnic composition of the methadone maintenance population. See PX 21.

* See *Dealing With Drug Abuse, A Report to the Ford Foundation*, 4 (Praeger 1972).

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plaintiffs to compile the exact racial statistics. However the TA refused to produce those records (even with names and other identifying information deleted) and, on plaintiffs' motion for sanctions and to compel discovery, the Court ruled that the TA was not required to produce the records (Nov. 16, 1973 hearing, TR 30-32).

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IX. NAMED PLAINTIFFS

While the TA has indicated a good deal of agreement with plaintiffs' proposed findings No. 74-110 & 116, plaintiffs also proposed a large amount of material not agreed to by the TA. Accordingly, plaintiffs agree with each of the TA's proposed counter-findings only insofar as set forth below and only with the additions and qualifications bracketed below:

74-87. The plaintiffs Carl A. Beazer, a Black born January 17, 1935, was first employed by the TA as a Car Cleaner on May 1, 1960 and on March 1, 1961 was appointed provisionally a Conductor, which appointment was made permanent on October 1, 1962. [The appointment as Conductor was a promotion based on an assessment of his record, together with his performance on written and practical exams designed to test a candidate's ability to perform the duties of the position being tested for.] On May 15, 1966, he was [similarly] promoted to the position of Towerman. On or about August 30, 1971 the United States Veterans Administration [in response to a routine request for hospital records and in vio-

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lation of federal law] reported to the TA that Beazer was a participant in a methadone maintenance treatment program conducted by the VA. He was suspended from duty on September 1, 1971 and on October 4, 1971 was served with disciplinary charges pursuant to § 75 of the Civil Service Law of the State of New York. It was specified that he had violated TA Rule 11(b) which prohibits the use or possession of certain drugs by employees, including narcotic drugs, without the written permission of the Medical Director. A hearing of the charges was held in November, 1971 and on November 26, 1971 the Hearing Referee recommended that the charges be sustained and that Beazer be dismissed from service effective that day. At the hearing, Beazer admitted his participation in a methadone maintenance treatment program and also his use of heroin while employed by the TA as a Towerman, but urged that his employment record warranted a penalty less than dismissal. In recommending dismissal the Hearing Referee noted that Beazer's disciplinary record included 8 Cautions and 3 Warnings for violations, 5 of which were functional. As of June 20, 1971, Beazer had a sick leave balance of 0 days out of a possible 144 accumulated at the rate of 12 days per year for each year of service. [The Hearing Referee did not rely on Beazer's disciplinary record. Beazer's work performance during the entire period he was employed by the TA was entirely competent as noted by the Impartial Review Board. PX 5. Beazer's dismissal was predicated solely on the TA's policy with respect to the employment of former drug abusers.

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See Decision of Hearing Referee Daniel Gutman, dated November 26, 1971. A TA employee can remain in good standing even if he has some "warnings" or "cautions" in his record, and, in fact, most TA employees eventually accumulate a number of "warnings" or "cautions" in their record.]

Beazer appealed the recommendation of dismissal to the TA's Impartial Disciplinary Review Board, composed of 3 members, one a representative of the TA, one a representative of the Transport Workers Union and the third member and also chairman, Samuel R. Pierce, Esq., former Justice of the General Sessions Court of the County of New York. The board in its "Opinion and Recommendation" noted that "[f]rom all the evidence presented, it would appear that Mr. Beazer handled his job competently while participating in the methadone program."

Based solely on the TA's rules and past practice [by which it felt bound], the board recommended his dismissal [but] also [strongly] recommended that the Union and the TA reconsider the rules relating to drug usage and recommended that Beazer be re-employed "if it is found that an employee using methadone can work in some capacity for the TA." [The Board especially urged the TA examine the merits of methadone treatment.] On August 15, 1972, the TA acting by the defendant W. B. McLaren, Executive Officer, Labor Relations and Personnel, adopted the recommendation of the Hearing Referee which had been approved by the Review Board and dismissed Beazer from its employ effective November

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26, 1971. [The opinion of the Impartial Disciplinary Review Board has been marked as PX 5.]

The Hearing Referee in his opinion stated that there was "credible evidence" that Beazer was "adhering" to the requirements of the methadone maintenance treatment program in which he was participating, [and noted that he was described as an "excellent patient"]. The Hearing Referee also said that, in his opinion, that while "employment in gainful occupation is important to the Methadone patient . . . [e]mployment should be sought out and provided, but not in the service of a public agency which has the responsibility of running a railroad with operations of the size and magnitude of the Transit Authority."

Beazer was a heroin addict for 15 years prior to his entry into the VA methadone program and had been detoxified [in short term programs] 5 times; twice at Beth Israel Hospital, once at Interfaith Hospital, and twice at Harlem Hospital, and on each occasion returned to the use of narcotic drugs within a short period of time. [Beazer had never been maintained on methadone or enrolled in a methadone maintenance treatment program prior to his entry into the Veterans Administration Methadone Maintenance Treatment Program, where as noted by the Hearing Examiner, he was an excellent patient. For more than 3 years Beazer has been completely free from illicit drug use.] Beazer's successful record of participation in the Veterans Administration Methadone Maintenance Treatment Program is illustrated by VA Hospital records, including his urinalysis records

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and a "Patient Report Summary" prepared by his Rehabilitation Counselor. PX 22.

[After his dismissal from the TA, plaintiff Beazer continued his excellent record of participation in the Veterans Administration program, and in November, 1973, he ceased methadone maintenance after a gradual process of detoxification. Since his detoxification, plaintiff Beazer has voluntarily continued to attend the Veterans Administration program for periodic counseling. During this attendance he has voluntarily given urine specimens which have been analyzed for evidence of drug abuse and have invariably shown the complete absence of such abuse.

Following Beazer's suspension by the TA, he was employed by the Veterans Administration until November of 1972 in their drug detoxification program as a rehabilitation technician counselor, providing individual counseling to persons enrolled in that program and group counseling to the families of such persons. Plaintiff Beazer voluntarily left his position at the Veterans Administration with a record of having consistently performed the duties of his position in an entirely competent fashion.

In November, 1972, plaintiff Beazer was employed by the Addiction Research and Treatment Corporation as an Intake Supervisor. The Addiction Research and Treatment Corporation conducts various treatment and research programs related to drug abuse. In fulfillment of his duties to the Addiction Research and Treatment Corporation, plaintiff Beazer was responsible for keeping records and performing other

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functions relating to the admission of persons to the Corporation's drug treatment programs.

In July, 1973, plaintiff Beazer voluntarily left the employ of the Addiction Research and Treatment Corporation where his job performance was at all times entirely competent and commenced employment with the Wildcat Service Corporation where he continues to be employed at the present time. Plaintiff Beazer's original position at the Wildcat Service Corporation was one of supervisor, from which he was promoted to Deputy Division Chief and then to Acting Division Chief. As Acting Division Chief, Beazer is responsible for assisting in the supervision of approximately 130 workers performing maintenance work under contract to various agencies of the City of New York, including the Police and Fire Departments.

Notwithstanding his excellent employment record subsequent to his dismissal by the TA, plaintiff Beazer has earned considerably less in the past two years than he would have had he been retained in the TA's employ.]

88-92. The plaintiff Francisco Diaz, an Hispanic was born November 20, 1934. On December 3, 1968, he was admitted to a methadone maintenance treatment program conducted by the Beth Israel Medical Center, with a history of using heroin for 18 years. On February 28, 1970 he took a written examination conducted by the City Civil Service Commission for the position of Maintainer's Helper—Group D with the TA. He passed the examination and was called for preappointment processing on June 5, 1970. He in-

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formed the Medical Department that he was a participant in a methadone maintenance treatment program.

A letter dated June 5, 1970, was sent to the City Department of Personnel by Dr. Harold L. Trigg, a psychiatrist and Associate Director of the Bernstein Institute (who in 1972 became a drug abuse consultant to the TA), stating that Diaz was an "excellent patient and [was] totally free of illicit drug use." (PX 23) He recommended his employment as a Maintainer's Helper. Diaz was passed over for appointment as a Maintainer's Helper [solely as a result of the TA's policy with respect to the employment of former drug abusers.

Diaz's TA medical record is stamped "med. rej." and "rejected by Doctor." His TA Medical Department form bears the following notation under "diagnoses" "attends methadone clinic." PX 19.] Subsequently, Diaz appealed to the Commission which [dismissed] the appeal on September 22, 1970.

Prior to his entry into the Beth Israel Methadone Maintenance Program in February 1968, Diaz had been detoxified of drugs [in short term programs] 4 times in the period between 1952 and 1968. Three of such detoxifications took place at Riverside Hospital and one at the Federal Drug Facility then at Lexington, Kentucky. On each of the 4 occasions after being detoxified he returned to using drugs. [Diaz had never been maintained on methadone or enrolled in a methadone maintenance treatment program prior to his entry into

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the Beth Israel methadone maintenance treatment program, where he was and is an excellent patient. For approximately 5 years Diaz has been free from illicit drug use.]

[Plaintiff Diaz was employed as a sheet metal mechanic from 1962 to 1973. He is currently employed as a helper in a commercial bakery. In both of these positions Diaz has consistently performed competently and satisfactorily. Nevertheless, Diaz has earned considerably less in the last four years than he would have had he been hired by the TA.]

93-100. The plaintiff Malcolm Frasier is Black and was born on March 23, 1944. In February 1971, he sought employment as a Bus Operator with MaBSTOA after having taken and successfully passed a written examination therefor. During pre-appointment processing MaBSTOA learned not from Frasier but from the Motor Vehicle Bureau that his motor vehicle operator's license had been suspended on January 14, 1971 for failing to answer a traffic summons. Frasier was not appointed. [Frasier had not received notice from the Motor Vehicle Bureau at the time of his pre-appointment processing that his licenses had been suspended. This incident was not the basis for his subsequent disqualifications by the TA which are the subject of this lawsuit.]

In October 1972, Frasier entered a methadone maintenance program sponsored by the Mary Scranton Foundation. He left the program detoxified on March 19, 1973. Prior thereto he had passed a second written examination for the position of Bus Operator with

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MaBSTOA and reported on March 9, 1973 for pre-appointment processing. Upon disclosing that he was a participant in a methadone maintenance program he was told by MaBSTOA personnel, including Personnel Administrator, Thomas Grainger, that he would not be appointed a bus driver. [On March 14, 1973, Grainger approved a MaBSTOA "Status Report" stating that Frasier was "rejected by Authority based on Medical findings. Applicant is presently engaged in Methadone Program. Company Policy not to hire applicants engaged in Methadone Program. PX 25.] Frasier was sent a letter dated March 14, 1973 by Mr. Grainger informing him he would not be employed because "[his] background [did] not meet the standards established for this position." Subsequently, an attorney representing him was also informed in writing that his appointment as a bus driver was not made "because of medical background based on information he divulged to [the] Medical Director."

In March, 1973, Frasier was notified by MaBSTOA that his name was on an eligible list for the position of Bus Cleaner. [On March 29, 1974, Dr. G. Salazar, Clinical Director of Frasier's methadone maintenance treatment program wrote a letter to the TA attesting to Frasier's excellent record in the program. PX 26.] Frasier reported for pre-appointment processing on April 2, 1973 and was told that he would not be appointed because of his drug history. [At the time of this processing Frasier had been completely detoxified from methadone after a two month long process of detoxification. PX 26, 27.] Later he was informed in

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writing that "[his] background [did] not meet the standards established for this position."

[During the 4 year period] prior to his entry into the methadone maintenance program Frasier had used narcotics. In early 1972 he participated in a detoxification program at Joint Diseases Hospital and in June 1972 [he participated in a detoxification program] at Metropolitan Hospital. [Both of these programs were short-term detoxification programs, unrelated to methadone maintenance treatment.]

[Plaintiff Frasier has held several positions of employment over the last ten years, and in all such positions has demonstrated his ability to perform as a competent worker. Several of these positions have been as truck driver, and one has been as a taxicab driver. Since February, 1974, plaintiff Frasier has been employed as a shipping clerk and has consistently performed his duties in a competent manner.

Notwithstanding his excellent employment record, plaintiff Frasier has earned considerably less in the past year than he would have had he been hired by the TA.]

101-110. The plaintiff Jose R. Reyes, a Hispanic, was born April 26, 1945. He was first employed by the TA on April 29, 1968 as a Maintainer's Helper—Group B. On April 26, 1970 he was promoted to the position of Ventilation and Drainage Maintainer [based on an assessment of his record, together with his performance on written and practical exams designed to test a candidate's ability to perform the duties of the posi-

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tion being tested for.] [On February 26, 1971 he was admitted to the Rapid Induction Unit of the Beth Israel Methadone Maintenance Treatment Program. On April 19, 1971, he was transferred to the Beth Israel Methadone Maintenance Treatment Program, at the St. Clair Hospital.] On October 12, 1971 his department referred him to the TA's Medical Department. A [medical examination and] urinalysis [were conducted but there was no conclusive evidence of drug use. PX 28. A second medical examination was scheduled for November 1, 1971.] [A] second urinalysis on [that date] showed positive for methadone [only] and [a nasal smear which would have revealed the use of cocaine or other drugs showed negative. PX 29.] Upon being questioned, Reyes stated he was a participant in a methadone maintenance treatment program. [Defendant Lanzetta told Reyes at that time that he would be suspended from duty because of that participation.] He was suspended from duty [immediately] and on December 13, 1971 disciplinary charges were preferred against him for violating the TA's [drug policy as set forth in plaintiffs' proposed finding No. 15.] A hearing of the charges was conducted on January 19, 1972. Reyes admitted he was on the program but urged that that fact should not justify his dismissal. There was testimony by a psychologist, Norman Gordon, that certain psychomotor tests administered to Reyes showed that he performed "equal to or better than others tested in the laboratory." [Dr. Gordon also testified] that ["the best test is experience with the person, that is, actual job history and how a person actually performs on the job."] He opined that Reyes

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was capable of performing any job that he was "qualified for." There was also testimony that Reyes had an excellent record of participation in the methadone maintenance treatment program.

Finding [that Reyes was participating in a methadone maintenance treatment program], the Hearing Referee recommended that Reyes be dismissed from service effective January 20, 1972. In his recommendation the Referee noted that Reyes had 2 departmental disciplinary hearings during his service of less than 4 years, one in 1969 for drinking alcoholic beverages on the job, for which he was suspended one day, and 6 Cautions for poor attendance, culminating in a department hearing for such violations in 1970, for which a Reprimand was administered. [The Hearing Referee did not rely on Reyes' disciplinary record, and Reyes' dismissal was predicated solely on the TA's policy with respect to the employment of former drug abusers. A TA employee can remain in good standing even if he has some "warnings" or "cautions" in his record, and, in fact, most TA employees eventually accumulate a number of "warnings" or "cautions" in their record.]

Reyes has used hard drugs [in the past, but he has been free of drug abuse since he entered the Beth Israel Methadone Maintenance Program. There was testimony at his disciplinary hearing by the Medical Director of the St. Claire program that he had an excellent record, had never failed to come in to get his methadone as scheduled, and did not use drugs other than methadone. (PX 4, p. 27.)

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Plaintiff Reyes has been employed by the Mt. Sinai Methadone Maintenance Program as a social health advocate from January 17, 1972 to date. In this position, Reyes' duties include acting as a liaison between participants in the program and social workers, and directly assisting in the resolution of employment, family, legal, housing and welfare benefit problems encountered by participants. Reyes has performed these duties in an entirely competent manner at all times.

Notwithstanding his excellent employment record, plaintiff Reyes has earned considerably less in the past three years than he would have had he remained in the TA's employ.]

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Compilation of the Agreed to and Contested Facts

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
72 Civ. 5307 (T.P.G.)

CARL A. BEAZER, *et al.*,

Plaintiffs,

—against—

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,

Defendants.

UPDATE TO FEBRUARY 7, 1975 OF PLAINTIFFS' EXHIBIT 31—
COMPILATION OF THE AGREED TO AND CONTESTED FACTS
TOGETHER WITH PLAINTIFFS' SUBMISSIONS REGARDING
DOCUMENTATION CONTAINED IN THE RECORD

I. Proceedings to Date

Exhibit 31 was submitted by plaintiffs at the commencement of the trial of this action. The position of the other parties was indicated and certain changes were agreed to during the discussion of the document at pp. 126 *et seq.* of the transcript dated October 22, 1974. Since that date, other changes have been agreed upon among counsel. The following represents a "pocket part" to the original document, updating that document to February 6, 1975.

Compilation of the Agreed to and Contested Facts

II. Position of the Defendants

A. The City Defendants

The City Defendants have, to the extent of their knowledge, agreed to the facts set forth by plaintiffs in the entire document, with certain modifications and additions set forth below.

B. The Transit Authority Defendants

The Transit Authority defendants have agreed only to those facts which it is indicated they agree to in the document, with certain modifications and additions as set forth below.

III. Modifications and Additions

1. *The Class* (p. 2) At the conference held in chambers on January 23, 1975, it was agreed that the class definition ordered by the Court in July of 1973 would be adhered to. Thus the class of plaintiffs consists of:

A. All those persons who have been dismissed from employment by the TA or MaBSTOA, or would in the future be subject to dismissal, solely because of their present or past participation in duly licensed and authorized methadone maintenance programs;

B. All those persons whose applications for employment with the TA or MaBSTOA have been rejected, or would in the future be subject to rejection, solely because of their present or past participation in duly licensed and authorized methadone maintenance programs;

Compilation of the Agreed to and Contested Facts

C. All those persons who have been or will in the future be deterred from applying for employment with the TA or MaBSTOA by the TA's and MaBSTOA's policy of excluding from such employment all persons who are participating or who have participated in duly licensed and authorized methadone maintenance programs.

2. *Page 8.* The T.A. has further admitted:

"The medical director has not ever given permission to an employee to use methadone."

3. *No. 16, Page 15.* The T.A. now admits:

"The Transit Authority drug policies apply to all positions in the Transit Authority."

4. *No. 24, Page 31.* Counsel for plaintiffs and the city defendants have agreed to change the last paragraph to read:

"Accordingly, 'drug free former addicts' and persons 'successfully participating in recognized chemotherapeutic treatment programs' such as methadone maintenance are fully eligible for employment in virtually all positions in the mayoral agencies . . ."

5. *Page 54.* Counsel for plaintiffs and the city defendants have agreed to the following modification 2nd indented paragraph: add "by the Department of Personnel" after "conducted."

3rd indented paragraph: delete last sentence.

Compilation of the Agreed to and Contested Facts

6. *No. 46, Page 58.* The T.A. has further admitted:

"In fact whenever a reassignment [to a light duty position] was indicated medically, such was able to be made."

7. *No. 71(a), Page 76.* Counsel for all parties now agree that:

"If called, Dr. Trigg, Director of the Beth Israel Methadone Maintenance Treatment Program, would testify to the data set forth in paragraph 71(a)."

No. 71(b). Counsel for all parties now agree that: the reference works cited contain the statistics set forth in paragraph 71(b).

No. 71(c). Counsel for all parties now agree that:

"If called, Peter Vogelsson, a responsible official of the Rockefeller University Methadone Information Center would testify to the statistics set forth in paragraph 71(c)."

• • • • •

Order Granting Petition for Writ of Certiorari**CERTIORARI GRANTED**

77-1427 NY City Transit Authority v. Beazer. The petition for a writ of certiorari is granted limited to questions 3 and 4 presented by the petition. — US —, 46 USLW 3792 (1978).

Supreme Court, U. S.
FILED

MAY 22 1978

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
October Term, 1977
No. 77-1427

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,

Petitioners,

—v.—

CARL BEAZER, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. 77-1427

NEW YORK CITY TRANSIT AUTHORITY, et al.,
Petitioners,

-v.-

CARL BEAZER, et al.,
Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

JURISDICTION

A full recitation of the chronology of this case in the court of appeals raises some question regarding the time elements on which this Court's jurisdiction rests, and suggests that the petition for certiorari which was filed on April 6, 1978 may be untimely.

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 22,

1977. Pet. la.^{1/} Thirty-three days thereafter, petitioners filed a motion for enlargement of time to file a petition for rehearing. The motion was granted, and petitioners were given leave to file a petition for rehearing on or before August 8, 1977.^{2/} However, petitioners did not file their petition for rehearing until August 11, 1977. A timely petition for rehearing would have suspended the running of the ninety day period for filing a petition for certiorari, Department of Banking, State of Nebraska v. Pink, 317 U.S. 264 (1942), reh. denied 318 U.S. 802 (1943), but petitioners' petition for rehearing was not timely.

QUESTIONS PRESENTED

1. Should this Court review the question whether the New York City Transit Authority or its officials are subject to suit for back pay under 42 U.S.C. §1983, where the Authority is established under New York law as an independent public benefit corporation, where the back pay award is a minor adjunct to equitable relief, and

^{1/} Citations in this form are to pages of the petition and the appendices thereto.

^{2/} Inexplicably, the order granting petitioners' motion was entered on August 11, 1977.

where the award rests on independent bases?

2. Does the award of attorneys' fees to respondents merit this Court's review, in the light of clear congressional intent to provide such awards to prevailing parties in actions brought under 42 U.S.C. §1983 against public agencies and their officials?

3. Should this Court review the rulings below that the New York City Transit Authority's policy of excluding from employment in any of its non-safety sensitive positions all present or past participants in methadone maintenance treatment programs violates the equal protection and due process clauses of the Fourteenth Amendment, where both courts below, applying the traditional, least intrusive standard of review to an extensive trial record, found that the Authority's policy bears "no rational relationship" to any of its legitimate needs?

STATEMENT

This action—brought pursuant to 42 U.S.C. §1983, the Fourteenth Amendment and Title VII of the 1964 Civil Rights Act (42 U.S.C. §2000e et seq.)^{3/}—challenged

^{3/} Jurisdiction was invoked under 28 U.S.C. §1343, 28 U.S.C. §1331 and 42 U.S.C. §2000e5(F)(3).

the legality of the New York City Transit Authority's policy of denying employment to any person who had ever participated in a methadone maintenance treatment program. The policy was an absolute, across-the-board prohibition applying to every one of the Transit Authority's 47,000 jobs—from janitors, file clerks and secretaries to painters, plumbers, and mechanics to admittedly safety-sensitive positions. Under the policy any job applicant or current employee who was found to have a history of methadone maintenance treatment was automatically rejected or fired with no consideration of individual qualifications, demonstrated work performance, or years of service at the Authority or elsewhere.

The District Court for the Southern District of New York, in a decision later upheld by the Court of Appeals for the Second Circuit, found that the overbroad application of the Transit Authority's methadone policy to all its positions went "beyond any rational or legitimate needs" (Pet. 66a) and thereby violated the equal protection and due process clauses of the Fourteenth Amendment. The court's ruling explicitly recognized the Authority's continuing right to exclude methadone maintenance participants from all safety-sensitive jobs, as well as its right when assessing methadone maintenance participants for non-sensitive positions to take into

account any job-related factors—including their particular drug histories and records in treatment. Pet. 66a-67a.

(1) District Court Proceedings

District court proceedings consisted primarily of a thoroughgoing factual inquiry into: (1) the nature of Transit Authority employment and the needs of the Authority regarding the performance of its employees and the safety of its operations; and (2) the nature of methadone maintenance treatment and its participants' performance abilities. After extensive discovery and stipulations of fact, the court set the case down for a trial which eventually spanned some three weeks.

Plaintiffs called as witnesses many of the leading experts in the country on medical aspects of methadone maintenance and the ability of methadone maintenance participants to work. First was the Director of the President's Special Action Office for Drug Abuse Prevention and the National Institute on Drug Abuse, the coordinating agencies in the field of drug abuse treatment and research for the federal government, which for a decade has undertaken a vast commitment of resources and support to methadone maintenance as the primary treatment modality for heroin addiction. He was followed by clinicians with direct experience treating

methadone participants and by experts with specialized knowledge about methadone participants' medical condition, functional abilities, social rehabilitation, and vocational experiences.

In addition to expert witnesses, plaintiffs presented testimony from a number of major employers who had had direct experience with the work performance of methadone maintenance participants in a wide variety of jobs, including highly skilled and safety-sensitive positions. The court also heard testimony regarding the individual plaintiffs' methadone maintenance treatment records, psychomotor and intellectual functioning, and job performance abilities.

The Transit Authority called witnesses to describe the nature of Transit Authority employment, but called only one expert, a pharmacologist whose testimony the court found of "little value." Pet. 20a.

Then, at the court's request, the court and counsel conducted an eight hour inspection of the Authority's command center, clerical offices, tunnels, switching towers, stations, maintenance shops, yards and cleaning facilities to obtain a first hand view of the performance and risks involved in different job positions.

Although both parties indicated after the tour that they had concluded their proof, the court expressed a concern that the medical and other evidence so disproportionately favored plaintiffs that perhaps it had not

received a balanced and complete factual picture. This concern led to nine additional trial days to determine "whether all sides of the problems involved in the case had been thoroughly explored, or whether any negative aspects of methadone and methadone maintenance programs existed that had not been presented.... The result was an additional nine days of trial at which exhaustive effort was made to probe the relevant questions with experts of varying points of view." Pet. 21a. Twenty-two additional witnesses offered expert opinion, described in detail the operations and clinical experiences of all of New York City's major methadone programs, and explained further the Transit Authority's operations and the specific duties of its various employees.

(2) District Court Decisions

On August 6, 1975, the district court issued an opinion containing fifty-one pages of fact findings. Pet. 13a-64a. Relying on what it found to be overwhelming evidence, the court concluded that the Transit Authority's absolute methadone policy was utterly without rational justification:

Plaintiffs have more than sustained their burden of proving that there are substantial numbers of persons on methadone maintenance who are as fit for employment as other comparable persons.

No one can have the slightest doubt about the heavy responsibilities of the TA to the public,

including their duty respecting the safety of millions of persons who are carried on its subways and buses. However, in my view, the blanket exclusionary policy against persons on methadone maintenance is not rationally related to the safety needs, or any other needs, of the TA.

....
... [T]he crucial point made so strongly by plaintiffs' witnesses was never convincingly challenged—that methadone as administered in the maintenance programs can successfully erase the physical effects of heroin addiction and permit a former heroin addict to function normally both mentally and physically. It is further proved beyond any real dispute that among the 40,000 persons in New York City on methadone maintenance (as in any comparable group of 40,000 New Yorkers), there are substantial numbers who are free of anti-social behavior and free of the abuse of alcohol or illicit drugs; that such persons are capable of employment and many are indeed employed. It is further clear that the employable can be identified by a prospective employer by essentially the same type of procedures used to identify other persons who would make good and reliable employees. . . .

This proof applies with equal, if not greater, force to those former heroin addicts who have successfully completed participation in a methadone program.

Pet. 19a-22a.

On the basis of this conclusion, the court held that the Transit Authority's policy violated the equal protection and due process clauses of the Fourteenth Amendment. The court made clear, however, that its holding left the Authority with unfettered discretion to continue

a total exclusion of methadone maintenance participants from safety-sensitive positions, as well as a wide degree of latitude in determining which methadone maintenance participants it would employ in non-sensitive positions:

I wish to stress certain things not compelled by my holding. The TA is not required to hire any present or past methadone maintained person where there is a legitimate reason to question the person's ability or competence—including a legitimate reason to believe that the person is abusing illicit drugs or alcohol.... The TA is not prevented from making reasonable rules and regulations about methadone maintained persons—such as requiring satisfactory performance in a program for a period of time such as a year, or forbidding methadone maintained persons employment in sensitive categories such as that of subway motorman, subway conductor, subway towerman, bus driver, and jobs dealing with high voltage equipment.... [T]he problem is the TA's flat ban, which goes beyond any rational or legitimate needs of the TA, and excludes persons just as qualified for employment as many who are hired by the TA.

Pet. 67a.

On January 24, 1977 the court entered a permanent injunction and judgment incorporating this limited constitutional decision. The court also ordered the Transit Authority and its defendant officers to employ two of the named plaintiffs, with back pay. Pet. 75a-80a.

(3) Court of Appeals Decisions

On June 22, 1977 the court of appeals issued an opinion affirming the district court's constitutional

ruling. Pet. 1a-8a. The court of appeals characterized the district court's opinion as "comprehensive and carefully limited." Pet. 2a. It noted that the district court had adopted a traditional "rational relationship" standard of constitutional review and had applied that standard to factual findings which the Transit Authority had not even contested.^{4/}

On August 11, 1977 the Transit Authority filed a petition for rehearing containing a suggestion for a rehearing en banc directed toward the question whether under 42 U.S.C. §1983 the district court had had jurisdiction over either the Authority or its officials. On February 1, 1978 the petition was denied, unanimously. Pet. 9a.

^{4/} In addition to upholding the district court's constitutional ruling, the court ordered that three individual plaintiffs who had been denied relief by the district court be reinstated in their jobs with back pay. Pet. 3a-8a.

ARGUMENT

1. The Transit Authority and its officials are subject to suit for back pay under 42 U.S.C. §1983, and for independent reasons, and the Authority's contention that the district court lacked subject matter jurisdiction under §1983 poses no question worthy of this Court's review.

Petitioners' contention that certiorari should be granted to review the failure of the court of appeals to hold that the Transit Authority and its officials are "immune from suit for both equitable and monetary relief under 42 U.S.C. §1983" (Pet. 8) is wholly without merit. Because under well-established principles the officials of the Authority are subject to suit for injunctive relief, the petitioners' argument reduces to the contention that they are not subject to suit for back pay under §1983.^{5/} This contention, which attempts to place this action within the holding of Monell v. Department of Social Services, 532 F.2d 259 (2d Cir. 1976), cert. granted 429 U.S. 1071 (1977) is totally misplaced for at least three reasons.

^{5/} Petitioners have expressly waived any possible claim of Eleventh Amendment immunity invocable in this action: "[N]o Eleventh Amendment claim is made in the case at bar. . . ." Pet. 12.

First, as the Transit Authority acknowledges, it is an "independent" public body. Pet. 6. Unlike the school board in Monell, it is, therefore, neither a municipality, a state, nor the alter ego of either, making it clearly a "person" subject to suit under §1983.

The Transit Authority was created by the New York State Legislature as a "body corporate and politic constituting a public benefit corporation" (N.Y. Pub. Auth. Law §1201), autonomous in its operations. The members of the Authority are appointed by the Governor, but once appointed they serve for a fixed term of eight years. Id., §§1201.1 and 1263.1. The Authority can sue and be sued (Id., §1204.1); acquire, hold, use and dispose of equipment (Id., §1204.3); acquire real property (Id., §1204.3a); appoint officers, assign their powers, and fix their rates of compensation (Id., §1204.5); retain counsel,^{6/} auditors, engineers and consultants (Id., §1204.7); and promulgate its own rules for both its internal management and the use of transit facilities under its jurisdiction (Id., §§1204.4, 1204.5-a).

^{6/} In this action the Transit Authority is represented by its own staff counsel, not by the Corporation Counsel of the City of New York or the Attorney General of the State of New York.

The award of back pay herein will deplete no state or municipal treasury. The operations of the Transit Authority are required to be "self-sustaining." Id., §1202.1. The Transit Authority is authorized to issue bonds and notes to meet its capital costs (Id., §§1207, 1207-a, 1207-b), and the Authority is solely responsible for those bonds and notes (Id., §1207-e). New York State has immunized itself and New York City against liability for the indebtedness of the Authority (Id., §1207-e), and provided that the debt of the Authority shall be payable only out of the Authority's funds.^{7/}

While the Court of Appeals for the Second Circuit has never expressly determined whether the Transit Authority is a "person" for the purposes of §1983, see Wright v. Chief of Transit Police, 527 F.2d 1262 (2d Cir. 1976), that court has explicitly held that independent agencies of New York City or State like the Transit Authority may be "persons" within the meaning of §1983:

While municipal corporations, that is, municipalities, are not deemed "persons" under the Civil Rights Act, see Monroe v. Pape . . . , "agencies"

^{7/} Although there is nothing in the record regarding the subject, petitioners imply that the City and State subsidize the Transit Authority. Pet. 11. There is, however, no provision in New York law that either the State or the City is required to provide such subsidies.

have always been so deemed. See e.g., Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970), cert. denied 400 U.S. 853 . . . Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968).

Forman v. Community Services, Inc., 500 F.2d 1246, 1255 (2d Cir. 1974), rev'd on other grounds sub nom United Housing Foundation, Inc. v. Forma, 421 U.S. 837 (1975).

In Monell the court cited a district court case^{8/} holding the Transit Authority not to be a "person." But the criterion deemed most significant by the Monell panel in determining that the Board of Education is not a "person" was its utter lack of revenue raising powers (see 532 F.2d at 263), a characteristic clearly not shared by the Transit Authority. Moreover, subsequent to its decision in Monell the court unanimously denied the Authority's petition for rehearing and suggestion for rehearing en banc. The petition was directed primarily to the question of jurisdiction under §1983, and from the court's action it must be assumed that when the court directly considered the issue it was satisfied that the Transit Authority is a "person."

The second reason that the Transit Authority's suability for back pay under §1983 raises no question

^{8/} Sams v. New York State Board of Parole, 352 F.Supp. 296 (S.D.N.Y. 1972).

worthy of review is that the back pay awarded below was but a minor adjunct of the equitable relief granted. The courts below have only ordered that back pay be awarded to five plaintiffs, and the district court has not yet determined what relief will be afforded the plaintiff class.

Though state and municipal officials may not be sued in their official capacities for monetary damages under §1983, they may still be sued under that section for equitable and declaratory relief. See, e.g., Monell, 532 F.2d at 264. Courts have recognized in other contexts that a claim for back pay, when joined with a request for injunctive relief, is equitable in nature. Therefore, whether or not an action for money damages can be maintained against the Transit Authority or its officials under §1983, the limited back pay awarded below was simply a minor part of the equitable relief that the district court's established §1983 power encompasses.^{9/}

^{9/} In Monell, which was an action solely for damages, the Second Circuit noted that the question of a court's jurisdiction to award back pay against state or local officials would be different in a case primarily equitable in nature. 532 F.2d at 267. Petitioners misleadingly quote Monell to imply that back pay can never be viewed as part of an equitable remedy. Pet. 11. Their attempt rests on omitting the critical statement: "There is no claim for reinstatement here." 532 F.2d at 267.

Finally, the question of whether the district court had jurisdiction under §1983 to award back pay against the Transit Authority is immaterial to the resolution of this case. All aspects of the judgment below rest solidly and independently on the district court's jurisdiction under 28 U.S.C. §1331.

Respondents' amended complaint alleged a violation of the Fourteenth Amendment, claimed the jurisdictionally necessary amount of damages, and invoked the district court's general federal question jurisdiction under 28 U.S.C. §1331. The district court found the Fourteenth Amendment violation and expressly rested jurisdiction on §1331. Pet. 12a. The relief ordered thus rests independently on that §1331 jurisdiction.^{10/} Accord-

^{10/} Petitioners have never claimed and cannot now object that the relief, as predicated on §1331 jurisdiction, was improper. Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977), makes clear such a claim would not address the subject matter jurisdiction of the courts below and cannot therefore be raised for the first time to this Court.

As in Doyle, the allegations in respondents' amended complaint were sufficient to confer subject matter jurisdiction on the district court. See also Bell v. Hood, 327 U.S. 678 (1946). Doyle explains that any questions such as the nature and scope of an implied direct cause of action under the Fourteenth Amendment, the relief available therein, and the existence of any "person" requirement analogous to that under §1983, relate only to

(continued on next page)

ingly, this Court's review of the separate question of whether the judgment against the Transit Authority or its officials could also rest on §1983 can be of no practical significance to this litigation and is completely unnecessary.^{11/}

whether the complaint stated a cause of action for which relief could be granted under §1331. See 429 U.S. at 278-81.

The Transit Authority has never questioned whether respondents properly stated a claim for which relief could be granted under §1331. As in Doyle, "the question as to whether the respondent[s] stated a claim for relief under §1331 is not of the jurisdictional sort which the Court raises on its own motion." 429 U.S. at 279. See also Fed.R.Civ.P. 12(h). Accordingly, it is clear that the district court had subject matter jurisdiction over the Authority and its officers under §1331, that it predicated relief independently on that jurisdiction, and that the respondents have failed to preserve any objection to the relief as ordered under §1331.

^{11/} It should also be noted that petitioners are named in their individual, as well as official, capacities. Regardless of the §1983 jurisdictional questions posed by petitioners, they are, therefore, individually liable under §1983 for monetary relief, subject only to the affirmative defense of "good faith." Woods v. Strickland, 420 U.S. 308 (1975) and Scheuer v. Rhodes, 416 U.S. 232 (1974) are discussed in the petition (Pet. 9-10), but the good faith defense was never asserted below.

2. In the light of clear congressional intent to provide attorneys' fees awards to prevailing parties in §1983 actions against public agencies and their officials, the award of attorneys' fees does not merit this Court's review.

The district court directed the payment to plaintiffs of counsel fees pursuant to the Civil Rights Attorney's Fees Award Act of 1976, Pub. L. 94-559, §2, 90 Stat. 2641, codified at 42 U.S.C. §1988.^{12/} So long as the officials of the Transit Authority can be enjoined under §1983 from maintaining its unconstitutional employment policies, respondents as prevailing parties are entitled to fees under the 1976 Act. The fact that petitioners are a public agency and its officials has no effect on this entitlement.

Congress adopted the attorney's fees legislation to provide an express authorization for awards of counsel

^{12/} The district court also based the attorneys' fees award on Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. Subsequent to its ruling that the Transit Authority's methadone policy was unconstitutional, but prior to the enactment of the 1976 Act, the court found the Authority's policy violative of Title VII for the purpose of awarding attorneys' fees. That ruling, however, is not before this Court. The court of appeals expressly refused to reach it and affirmed the attorneys' fee award solely on the basis of the 1976 Act. Pet. 3a. See Point 5 infra.

fees in §1983 cases to lawyers acting as private attorneys general. And the legislative history of the Act demonstrates the unequivocal intention of Congress that attorneys' fees be assessed against public agencies and their officials. The Senate Report stated:

As with cases brought under 20 U.S.C. §1617 the Emergency School Aid Act of 1972, defendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

S. Rep. No. 94-1011, p.5. Similarly the House Report noted that:

[G]overnment officials are frequently the defendants in cases brought under the statutes covered by [the bill]. See e.g., Brown v. Board of Education...Such governmental entities and officials have substantial resources available to them through funds in the common treasury, including the taxes paid by the plaintiffs themselves.... The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against government officials or entities.

H. R. Rep. No. 94-1558, p.7.

In the Senate, Senator Helms offered an amendment to bar awards of counsel fees against "any territory or possession thereof, or any State of the United States or any political subdivision thereof including special

purpose units of general local governments."^{13/} Senator Helms urged that the amendment was necessary to "afford protection to financially pressed State and local governments." The Senate rejected the proposal by a vote of 59 to 28.^{14/}

The language of the statute is equally clear. It provides for an award "in any action" to enforce §1983, and does not except from its coverage public agencies or their officials.

In short, there is no basis whatever for petitioners' contention that they are not liable for attorneys' fees under 42 U.S.C. §1988.^{15/}

^{13/} 122 Cong. Rec. S 16433 (daily ed. Sept. 22, 1976).

^{14/} *Id.*, S 16434.

^{15/} The attorneys' fees awarded respondents, as modified and affirmed by the court of appeals, consist solely of compensation at an hourly rate for work performed over five years of litigation. The district court had awarded an additional \$50,710 "premium", which the court of appeals, heeding its own "admonition to scrutinize attorneys' fee applications with an 'eye to moderation'", eliminated. Pet. 6a.

3. The determination below that the Transit Authority's methadone policy is unconstitutional, resting on application of the traditional "rational relationship" test to unassailable fact findings, presents no question worthy of this Court's review.

As the court of appeals recognized, the district court's judgment that the Transit Authority's methadone policy violated the equal protection and due process clauses of the Fourteenth Amendment rested soundly on the well established, unintrusive "rational relationship" standard of judicial review and on extensive findings of fact supported by a substantial record. After addressing itself for fifteen days of trial to every possible concern of the Authority within speculation, the district court could not have stated its conclusion more clearly: "The blanket exclusionary policy against persons on methadone maintenance is not rationally related to the safety needs, or any other needs, of the TA." (Emphasis added). Pet. 19a. Petitioners' misstatement of the opinions below and their belated attempt to reargue factual controversies conclusively resolved against them do not warrant this Court's attention.

Petitioners' assertion (Pet. 13), that the courts below applied the so-called "strict scrutiny" test of constitutionality to the Transit Authority's methadone policy is plainly wrong. Both courts expressly recognized that a public employer may exclude a class of persons

sharing some characteristic if excluding them bears but a rational relationship to some legitimate interest of the employer. The district court stated the standard of review as follows:

A public entity such as the TA cannot bar persons from employment on the basis of criteria which have no rational relation to the demands of the jobs to be performed.

Pet. 64a (emphasis added). The court of appeals affirmed the "district court's conclusion of law... that the TA's methadone rule has 'no rational relationship to the demands of the job to be performed.'" Pet. 2a-3a. Previous decisions of this Court make clear that the equal protection and due process clauses require a public employer's eligibility criteria to meet this lenient rationality test. See, e.g., Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312-14 (1976); McCarthy v. Philadelphia Civil Service Comm'n, 424 U.S. 645 (1976); Detroit Police Officers Ass'n v. City of Detroit, 405 U.S. 950 (1972), Aff'g mem., 385 Mich. 519, 190 N.W.2d 97, Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); cf. Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977) (unemployment compensation).

Neither court below so much as hinted at applying a more exacting standard of review. As the court of appeals remarked, "the legal issues were relatively simple and few." Pet. 5a. All parties urged the courts

below to test the Transit Authority's policy by the limited "rational relationship" standard, and they were joined in this regard by the United States as amicus curiae, which urged the court of appeals to affirm the district court judgment.^{16/} In short, there was no controversy over the governing constitutional standard below, and there is in fact none here.^{17/}

The courts below applied the rational relationship test to a factual record compellingly in respondents' favor. The rational relationship test requires neither perfect nor scientifically calibrated public employment policies, but it does demand some reasonable connection between the eligibility criterion under review and the legitimate needs of the employer. As the court of

^{16/} See Brief of Plaintiffs-Appellees to the Second Circuit at 36-37; Brief of Defendants-Appellants to the Second Circuit at 18-19; Brief for the United States as Amicus Curiae to the Second Circuit at 11-12, 17.

^{17/} The district court noted that "there is no basic dispute among the parties as to the constitutional doctrines which apply to the present case." Pet. 64a. The court of appeals recognized the same: "There was no dispute over the governing constitutional doctrines" Pet. 5a. Not until its petition to this Court has the Transit Authority suggested that the district court applied an erroneous standard of review.

appeals confirmed, the voluminous record "overwhelmingly supports" the trial court's findings of fact (Pet. 2a), which in turn undercut every conceivable suggestion of a rational basis for the TA's policy.

The district court found that methadone maintenance treatment renders many former drug addicts capable of successful performance in a wide range of employment and that many persons in methadone treatment show no greater incidence of antisocial behavior than the general population. Pet. 21a. The court further found that many methadone maintenance participants are as qualified for employment in many of the Transit Authority's job categories as other persons the Authority hires. Pet. 67a. These findings demonstrated that no group characteristic could rationally justify, on grounds of safety, productivity, or any relevant basis, the Authority's across-the-board exclusion of all present and former methadone treatment participants from employment in all of its many non-safety-sensitive positions.

Additionally, the court rejected on the basis of fact findings any suggestion that the administrative burden of identifying employable methadone patients justified the blanket exclusion. Whatever the legal relevance of such burdens where they do exist, the district court found as a matter of fact that the employable could be identified through the screening procedures presently used by the TA to judge any applicant's likely work habits or

probability of theft or drug abuse. Pet. 21a; 46a. In short, the individualized consideration required by the courts below imposes no burden on the TA that it does not already assume in screening all applicants and monitoring all employees.

The TA does not and could not argue that any of the findings of fact are "clearly erroneous."^{18/} So long as those findings stand, the conclusion of unconstitutionality follows inexorably under the established standards of review applied below. That conclusion presents no question worthy of this Court's review.

^{18/} The Transit Authority's notation that the record includes testimony challenging the efficacy of methadone programs (Pet. 15) has no place in a petition for certiorari. The overwhelming testimony was to the contrary, as were the court's findings of fact which are not challenged as "clearly erroneous."

The district court's acknowledgment of differences of opinion on the merits of treating heroin addiction with methadone, also seized upon by the Transit Authority (Pet. 15), was simply an introductory reference to differences in treatment philosophy. The comment had no relevance to and in no way detracted from the court's extensive findings on the employability and functioning of methadone patients, the only subjects relevant to the legitimate concerns of the Authority.

4. Federal legislation prohibiting employment policies that flatly exclude former addicts deprives the question of the constitutionality of the Transit Authority's methadone policy of any future practical significance.

The conclusion that the Transit Authority's methadone policy is unconstitutional rests on a sound basis in law and fact. However, lest there be any question regarding the future practical significance of the constitutional rulings below, respondents wish to note recent federal legislative developments that plainly forbid public employers from maintaining exclusionary rules like the Transit Authority's methadone policy. In the light of these developments, review of the constitutionality of the policy would have no bearing on whether it or other employers may continue such practices.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, provides that "[n]o otherwise qualified handicapped individual...shall, solely by reason of his handicap...be subjected to discrimination under any program or activity receiving Federal financial assistance." A.1.^{19/} On April 12, 1977, the Attorney General of the United States issued an opinion, based on

^{19/} Citations in this form are to the Appendix annexed hereto.

extensive analysis of the legislative history, that drug addicts are "handicapped individuals" protected by the antidiscrimination provisions of §504. A.5. The consequence of this interpretation is that all public entities, such as the Transit Authority, which receive revenue sharing funds^{20/} or other federal financial assistance cannot exclude otherwise qualified individuals from employment solely on the basis of their drug addiction.

On January 13, 1978 the Department of Health, Education and Welfare (HEW) issued final regulations pursuant to Exec. Order No. 11,914, 41 Fed. Reg. 17,871, (1976),^{21/} which requires HEW to set government-wide standards for the implementation of §504. Under these regulations all federal agencies are required to issue their own regulations prohibiting non-job-related employment discrimination by recipients of their funds against persons with a current or prior record of handicap—including active as well as former drug addicts. A.2-A.6. Employers will further be required to make "reasonable accommodations" for active and former addicts in their workforces. A.5. HEW specifically contemplated that

^{20/} The antidiscrimination provisions of §504 are applied to recipients of revenue sharing funds under 31 U.S.C. §1242.

^{21/} The executive order is set out at A.1-A.2.

these regulations would be applied to the transportation industry. A.3.

These statutory requirements go far beyond the simple individualized consideration of present and past methadone maintenance treatment participants ordered by the district court. Accordingly, review by this Court of the constitutional rulings below can have no impact on the present and future legality of absolute exclusionary employment practices such as the Transit Authority's policy.

5. No question of the legality of the Transit Authority's methadone policy under Title VII of the Civil Rights Act of 1964 is appropriately before this Court.

The Transit Authority has suggested that an appropriate question for review is whether its methadone policy violates Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e et seq. The suggestion is erroneous.

As the Authority states, the district court found it liable under Title VII "for the sole purpose of establishing jurisdiction to award attorneys' fees." Pet. 5. After its Title VII decision, the district court found the Transit Authority independently liable for attorneys' fees under the newly enacted Civil Rights Attorney's Fees Award Act of 1976 (42 U.S.C. §1988). Id.

Given the 1976 Act as a basis for the fee award, the court of appeals expressly refused to reach the issue of Title VII liability. Pet. 3a. Review of the issue by this Court would therefore be both inappropriate and purposeless.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Dated: New York, New York
May 18, 1978

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APPENDIX

APPENDIX

Rehabilitation Act of 1973, Pub. L. No. 93-112, §504, 87 Stat. 394, 29 U.S.C. §794:

No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Exec. Order No. 11,914, 41 Fed. Reg. 17,871 (1976):

Nondiscrimination in Federally Assisted Programs

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, including section 301 of title 3 of the United States Code [section 301 of Title 3, The President], and as President of the United States, and in order to provide for consistent implementation within the Federal Government of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) [this section], it is hereby ordered as follows:

Sec. 1. The Secretary of Health, Education, and Welfare shall coordinate the implementation of section 504 of the Rehabilitation Act of 1973, as amended [this section], hereinafter referred to as section 504 [this section], by all Federal departments and agencies empowered to extend Federal financial assistance to any program or activity. The Secretary shall establish standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices, within the meaning of section 504 [this section]. The Secretary shall assist Federal departments and agencies to coordinate their programs and activities and shall consult

with such departments and agencies, as necessary, so that consistent policies, practices, and procedures are adopted with respect to the enforcement of section 504 [this section].

Sec. 2. In order to implement the provisions of section 504 [this section], each Federal department and agency empowered to provide Federal financial assistance shall issue rules, regulations, and directives, consistent with the standards and procedures established by the Secretary of Health, Education, and Welfare.

....

Gerald R. Ford

43 Fed. Reg. 2132 (1978) (to be codified in 45 C.F.R. Part 85):

SUMMARY: This rule implements Executive Order 11914. "Nondiscrimination With Respect to the Handicapped in Federally Assisted Programs," under which the Department of Health, Education, and Welfare is required to coordinate government-wide enforcement of section 504 of the Rehabilitation Act of 1973, as amended. In particular, the rule sets forth enforcement procedures, standards for determining which persons are handicapped, and guidelines for determining what practices are discriminatory. These procedures, standards, and guidelines are to be followed by each federal agency that provides federal financial assistance in issuing regulations implementing section 504.

EFFECTIVE DATE: January 13, 1978.

....

Summary of Rule and Analysis of Comments

....

It is again noted that drug addiction and alcoholism are included in the list of diseases and impairments.

....

Sections 85.52-55 contain the basic requirements for the elimination of discrimination on the basis of handicap in employment. These sections should be augmented, where possible, with provisions appropriate to the programs assisted by each agency.

....

One comment to §85.52, raised in the context of the transportation industry but of general applicability, inquired about the effect of this section on local, state, and federal laws that govern, in the interest of safety, driver eligibility. Local and state laws affecting the eligibility of handicapped persons for employment may continue to be applied, but only if they set standards that are job related and that do not unjustifiably disqualify such persons for particular jobs. Federal regulations as well should be reviewed to determine whether they meet this standard.

....

...A test or other selection criterion "discriminates" if it screens out or tends to screen out handicapped persons but is not job related.

....

§85.52 General prohibitions against employment discrimination.

(a) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity that receives or benefits from federal financial assistance.

(b) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(c) The prohibition against discrimination in employment applies to the following activities:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including social or recreational programs; and

(9) Any other term, condition, or privilege of employment.

(d) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this paragraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeship programs.

\$85.53 Reasonable accommodation.

A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

\$85.54 Employment criteria.

A recipient may not use employment tests or criteria that discriminate against handicapped persons and shall ensure that employment tests are adapted for use by persons who have handicaps that impair sensory, manual, or speaking skills.

\$85.55 Preemployment inquiries.

A recipient may not conduct a preemployment medical examination or make a preemployment inquiry as to whether an applicant is a handicapped person or as to the nature or severity of a handicap except under the circumstances described in 45 CFR 84.14.

Opinion of the Hon. Griffin B. Bell, Attorney General of the United States, to Hon. Joseph A. Califano, Secretary, Department of Health, Education and Welfare, April 12, 1977:

You have requested our opinion as to whether drug addicts and alcoholics are "handicapped individuals" within the meaning of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701 et seq.

You raise this question in the context of section 504 of the Act, 29 U.S.C. § 794. . . . Executive Order 11914 designates the Department of Health, Education, and Welfare as the lead

agency in establishing standards and procedures under section 504 of the Act, and I understand that you are currently reviewing the regulations to be issued for this purpose.

The proper interpretation of the term "handicapped individual" will also affect the employment practices of the Federal Government, which is required by section 501(b) of the Act to implement an affirmative action program for hiring the handicapped, and the employment practices of Federal contractors, who are required by section 503(a) to implement similar affirmative action programs. See 29 U.S.C. §§ 791(b) and 793(a) (1975 Supp.).

It is our conclusion that alcoholics and drug addicts are "handicapped individuals" for purposes of Title V of the Act, which includes the antidiscrimination provision in section 504 that you are charged with implementing. . . . [S]ection 504 does in general prohibit discrimination against alcoholics and drug addicts in federally assisted programs solely because of their status as such, just as it prohibits discrimination solely on the basis of other diseases or conditions covered by the Act.

Supreme Court, U. S.
FILED

MAY 26 1978

MICHAEL ROBAX, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977
No. 77-1427

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,
Petitioners,
—v.—
CARL BEAZER, *et al.*,
Respondents.

**PETITIONERS' REPLY TO RESPONDENTS' BRIEF
IN OPPOSITION TO CERTIORARI**

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This reply is submitted to correct certain inaccuracies and misstatements by the Respondents herein in their Brief in Opposition to Certiorari.

I.

Respondents' brief attempts to base jurisdiction on 28 U.S.C. §1331, asserting that the District Court "expressly rested jurisdiction on §1331". (Resp's. brief, p. 16). In fact, neither the District Court nor the Court of Appeals based jurisdiction on §1331.

The District Court decision found plaintiffs entitled to relief "under the Fourteenth Amendment and under 42 U.S.C. §1983" (Petitioners' Petition, p. 68a*). It is no-

* Unless otherwise indicated, all page references will be to Petitioners' Petition for a Writ of Certiorari.

where stated that the court's decision was grounded on 28 U.S.C. §1331.

Likewise, the Court of Appeals for the Second Circuit found that the employment policy

. . . in this action brought under 42 U.S.C. §1983—violated the equal protection and due process clauses of the Fourteenth Amendment. (Petition, p. 2a)

Respondents apparently infer §1331 jurisdiction from the lower courts' reference to the Fourteenth Amendment. However, 42 U.S.C. §1983 is expressly designed as a vehicle for assertion of constitutional rights. It is apparent from the above quoted language of the Court of Appeals that the finding of a violation of the Fourteenth Amendment was an integral part of the finding of a violation of 42 U.S.C. §1983, and did not have reference to any other jurisdictional base.

Where jurisdiction is found lacking under §1983, jurisdiction under §1331 is not to be lightly inferred. This Court has recently observed that the question of whether an action for damages may be maintained under 28 U.S.C. §1331 against a public agency which is immune from liability for damages under 42 U.S.C. §1983, is "an extremely important question" (*Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 278 (1976)).

Numerous cases have supported the proposition that the Congressional intent to immunize public agencies from liability for damages under §1983, would be thwarted by the use of §1331 as the basis for an award of damages.

The Court of Appeals in *Kostka v. Hogg*, 560 F. 2d 37, 40 (1st Cir. 1977) stated:

Even if we assume that an implied right of action might exist [independently] under the Fourteenth Amendment, the policies underlying the qualified privilege for officials sued under §1983 would be fully applicable to a damages action based on the Fourteenth Amendment. The policies in question . . . have equal force regardless of the source of the plaintiff's right of action. See *Kermit Construction Co. v. Banco Credito y Ahorro Ponceno*, 547 F. 2d 1 (1st Cir. 1976).

* * * * *

In light of . . . the deliberate exclusion of municipalities from §1983, the power of federal courts to make such entities liable through a different means should not be lightly inferred. 560 F. 2d at 44 fn. 6.

See also *McKnight v. Southeastern Penn. Transportation Authority*, 438 F. Supp. 813 (D.C. Pa. 1977); *Rafferty v. Prince George's County*, 423 F. Supp. 1045 (D. Md. 1976); *Farnsworth v. Orem City*, 421 F. Supp. 830 (D. Utah 1976); *Pitrone v. Mercadante*, 420 F. Supp. 1384 (E.D. Pa. 1976); *Turano v. Board of Educ. of Island Trees Union Free School Dist. No. 26*, 411 F. Supp. 205 (E.D.N.Y. 1976); *Mitchell v. Libby*, 409 F. Supp. 1098 (D. Vt. 1976); *Snead v. Department of Social Services of the City of N.Y.*, 409 F. Supp. 995, 1001-02 (S.D.N.Y. 1975) (three-judge court) (Mulligan, J. concurring); *Weathers v. West Yuma County School Dist. R-J-1*, 387 F. Supp. 552 (D. Colo. 1974), *aff'd* 530 F. 2d 1335 (10th Cir. 1976); *Smetanka v. Borough of Ambridge*, 378 F. Supp. 1366 (W.D. Pa. 1974); *Perzanowski v. Salvio*, 369 F. Supp. 223 (D. Conn. 1974).

II.

Respondents seek to distinguish the case at bar from *Monell v. Department of Social Services*, 532 F. 2d 259 (2d Cir. 1976), *cert. granted*, 429 U.S. 1071 (1977) on the ground that the Transit Authority, unlike the Board of Education, is an "independent" public body with revenue raising powers. Respondents chose to omit from their brief the clear language of the Court of Appeals in *Monell*:

We think that the Board of Education is no more a 'person' than the State University, the City Employees' Retirement System or the *City Transit Authority*. (emphasis added) 532 F. 2d at 263.

The Transit Authority was created by the Legislature as a "body corporate and politic constituting a public benefit corporation." (Public Authorities Law, §1201.1.) The Public Authorities Law expressly declares that the Authority "shall be regarded as performing a governmental function in carrying out its corporate purpose and in exercising the powers granted by this title." (P.A.L. §1202.2) The Authority operates the transit facilities owned by the City of New York. (P.A.L. §1203) It is composed of members appointed by the governor by and with the advice and consent of the senate. (P.A.L. §§1201.1, 1263) The Authority performs the functions previously vested in the Board of Transportation of the City of New York, a former city agency. (P.A.L. §1202.1)

In *Lerner v. Casey*, 2 N.Y. 2d 355 (1957), the New York Court of Appeals observed that the City of New York owns the rapid transit facilities which constitute the New York City Transit System, that those facilities are leased by

the City to the Transit Authority, that under the lease, the City is required to pay the costs of the capital improvements on the transit system, and that the City thus has a proprietary interest in those facilities. The Court concluded that "the operation of the rapid transit facilities is a basic governmental service indispensable to the conduct of all other governmental as well as private activities necessary for the public welfare."

The basic governmental role of the Transit Authority closely parallels the governmental role of the local independent school board in *Monell*. The case at bar thus shares with *Monell* the question of jurisdiction over a public agency and its officials under 42 U.S.C. §1983.

Respondents' quotation of *Forman v. Community Services, Inc.*, 500 F. 2d 1246 (2d Cir. 1974), *rev'd on other grounds sub nom. United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975), for the proposition that agencies are deemed "persons" under the Civil Rights Act (Respondents' Brief, pp. 13-14), is thoroughly misleading, in view of the repudiation of the *Forman* language by the same Second Circuit Court of Appeals in *Monell*. The *Monell* Court specifically stated:

To the extent that the language of the *Forman* opinion may be read to imply that *all* 'agencies' are persons under §1983, 500 F. 2d at 1255, we are not bound by the broad nature of the generalization and we doubt that it was so intended. 532 F. 2d at 263.

III.

The respondents seek to minimize the effect that the award of back pay would have on the petitioners, asserting that only five plaintiffs have been awarded back pay. However, respondents' characterization of the back pay as "but a minor adjunct of the equitable relief granted" is belied by the respondents' further statement that "the district court has not yet determined what relief will be afforded the plaintiff class." (Respondents' brief, p. 15). Respondents' apparent intention to return to the district court to seek back pay for the entire "plaintiff class" demonstrates the magnitude of the potential back pay liability in this case. The impact on the public treasury would not be diminished in any way by the "equitable" label.

IV.

Respondents' brief asserts that "recent federal legislative developments" concerning employment of the handicapped obviate the necessity for review of the constitutional issues in this case.

The legislative developments referred to by respondents are a recent regulation promulgated by the Department of Health, Education and Welfare (HEW) under Section 504 of the Rehabilitation Act of 1973, and an opinion of the Attorney General declaring drug addicts to be handicapped persons within the meaning of the regulation.

The HEW regulation (42 Fed. Reg. 22675, May 14, 1977) is limited specifically to recipients of federal funds from HEW. Since the Transit Authority does not receive funds

from HEW, it is not affected by the HEW regulation. The Transit Authority is a recipient of funds from the Department of Transportation (DOT) and will be affected by regulations yet to be promulgated by that Department.

The extent to which the DOT may require the employment of drug addicts will not be known until the DOT regulation is promulgated and interpreted. Speculation as to the scope and effect of a future DOT regulation is irrelevant to consideration of the significant constitutional issues presented by the petition herein.

CONCLUSION

For the reasons stated above, as well as those stated in the Petition for Certiorari, Petitioners pray that the Petition for Certiorari be granted.

Respectfully submitted,

Dated: May 1978

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1427

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,

*Petitioners,**

—v.—

CARL BEAZER, *et al.*,

*Respondents.***

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the United States Court of Appeals, Second Circuit, of June 22, 1977 is reported at 558 F.2d 97,

* Petitioners, who were defendants in the District Court, appellants-cross-appellees in the appeal to the Circuit Court are the New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority, William J. Ronan, individually and in his capacity as a member and as chairman and chief executive officer of the New York City Transit Authority and also as a director and as chairman and chief executive officer of the Manhattan and Bronx Surface Transit Operating Authority, and his successors in office, William L. Butcher, Lawrence R. Bailey, Harold L. Fisher, William A. Shea, Eben W. Pyne, Leonard Braun, "Justine" N. Feldman, Donald H. Elliott, Frederic B. Powers and Mortimer Gleeson, individually and in their capacities as members of the New York City Transit Authority and directors of the Manhattan and Bronx Surface Transit Operating Au-

and reprinted as Appendix A of the petition for Writ of Certiorari (p. 1a). The opinion of the United States Court of Appeals, Second Circuit, entered on February 1, 1978, denying petitioners' petition for rehearing is unreported and appears as Appendix B of the petition for Writ of Certiorari (p. 9a). The opinion of the United States District Court for the Southern District of New York dated August 6, 1975, is reported at 399 F. Supp. 1032 and reprinted as Appendix C of the petition for Writ of Certiorari (p. 11a). The Supplemental Opinion of the United States District Court for the Southern District of New York dated May 5, 1975, is reported at 414 F. Supp. 277 and reprinted as Appendix D of the petition for Writ of Certiorari.

thority, and their successors in office; Wilbur B. McLaren, individually and in his capacity as executive officer for labor relations and personnel of the New York City Transit Authority, and his successors in office; Louis Lanzetta, individually and in his capacity as medical director of the New York City Transit Authority, and his successors in office. The Civil Service Commission of New York; Personnel Department of the City of New York; Harry I. Bronstein, individually and in his capacity as a member and as Chairman of the Civil Service Commission of the City of New York, and director of the Personnel Department of the City of New York, and his successors in office; David Stadtmauer and James W. Smith, individually and in their capacities as members of the Civil Service Commission of New York, and their successors in office, were dismissed from the action after the District Court judgment.

** Respondents, who were plaintiffs in the District Court, respondents-cross-appellants in the appeal to the Circuit Court are Carl Beazer; Jose R. Reyes; Francisco Diaz; Malcolm K. Frasier, individually and on behalf of all others similarly situated. Nathaniel Wright was added as a named plaintiff-appellee-cross-appellant member of the class after the District Court trial had begun.

Jurisdiction

The judgment of the United States Court of Appeals, Second Circuit, was entered on June 22, 1977, Appendix A of the petition for Writ of Certiorari (p. 1a). A motion and petition for a rehearing en banc was denied by the United States Court of Appeals, Second Circuit, on February 1, 1978, Appendix B of the petition for Writ of Certiorari (p. 9a). An order granting petitioners' motion for stay of mandate was entered on March 10, 1978.

The petition for Writ of Certiorari was filed April 6, 1978, and granted June 26, 1978. (See Appendix 123A.)* The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Fourteenth Amendment, Section 1 of the Constitution of the United States; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.; the Civil Rights Act of 1871, 42 U.S.C. § 1983; New York State Public Authorities Law §§ 1200, et seq.; 28 U.S.C. § 1254(1), are set out in Appendices F-G and I-J of the petition for Writ of Certiorari.

Questions Presented

- I. Is the petitioners' denial of employment to former heroin addicts participating in methadone maintenance programs, an unconstitutional denial of due process and equal protection under the Fourteenth Amendment?

* Hereinafter, references to Supreme Court Appendix will be designated as "A. p. ____."

II. Is the petitioners' denial of employment to former heroin addicts participating in methadone maintenance programs, an unlawful racial discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.?

Statement of Facts

The Class

As defined by the District Court, the class represented by the named respondents (the plaintiffs below), consists of all those persons who have been or would in the future be subject to dismissal or rejection as to employment by the petitioners on the ground of present or past participation in methadone maintenance programs. (399 F. Supp. at p. 1035).

The Petitioners

The petitioners, the New York City Transit Authority and its subsidiary, the Manhattan and Bronx Surface Transit Operating Authority (hereinafter collectively referred to as the Transit Authority), are public benefit corporations organized under the laws of the State of New York to operate and maintain all subway and bus transportation facilities owned by the City of New York. (N.Y. Public Authorities Law, §§ 1201.1, 1203)

The Transit Authority employs approximately 27,000 persons, including hourly paid and supervisory employees, in the operation and maintenance of the subway system, and about 14,000 employees in the bus operations. In addition, there are about 3500 persons employed in clerical, administrative and professional titles, and 3600 employed as transit police officers. The Authority hires approxi-

mately 3000 employees annually. (R. Tr. 12/12/74, pp. 24-30, 52, 61)*

The subway and bus system operated by the Transit Authority carries about six million passengers each business day, with a total of about two billion passengers a year. (R. Tr. 12/12/74, pp. 25, 61)

The Transit Authority's Policy Regarding Methadone

It is the policy of the Transit Authority to exclude from employment persons who use narcotic drugs, including former heroin addicts who are in methadone maintenance programs. At the same time, the Authority will give individual consideration to people with a past history of drug addiction including those who have completed either a drug free or a methadone maintenance program, and who have been completely drug free and have had a stable history for at least five years. (R. Tr. 1/28/75, pp. 709, 714, 715)

Rule 11(b) of the Transit Authority's Rules and Regulations provides:

"(b) Employees must not use, or have in their possession, narcotics, tranquilizers, drugs of the Amphetamine group or barbiturate derivatives or paraphernalia used to administer narcotics or barbiturate derivatives, except with the written permission of the Medical Director-Chief Surgeon of the System." (Pl. Ex. 58, appearing in Circuit Court Appendix at p. 2799)

The Transit Authority's Executive Officer for Labor Relations and Personnel, Wilbur B. McLaren, testified that in 1969, as a result of a newly negotiated early retirement plan, a large number of the Authority's experienced opera-

* References are to the Trial Transcript. Since the volumes of the Trial Transcript are not paginated consecutively, references are to dates and page numbers of the various volumes.

tions and maintenance employees retired. The accelerated hiring and training of large numbers of new employees created a number of operational problems, including a series of accidents, collisions and fires. (R. Tr. 10/25/74, p. 492)

In an effort to deal with these problems, the Transit Authority undertook a reevaluation of its job standards, including its physical and medical standards. During the course of this reevaluation, the Authority became aware, for the first time, of drug use by a significant number of employees and applicants for employment. (R. Tr. 10/25/74, pp. 495-499)

The Transit Authority began to use urinalysis as a method of detecting drug use in applicants for employment and in the periodic examinations of employees in critical titles. (Employees in critical titles are required to undergo physical examinations on an annual or biennial basis, depending on the employee's age.) From January 1971 to October 1974, the date of McLaren's testimony, the Authority identified over 600 employees and applicants as drug users. (R. Tr. 10/25/74, pp. 497-501)

A series of seminars and conferences was initiated by the Transit Authority to educate key personnel to the problems connected with drug use, and to try to resolve the question of whether the Authority could employ drug users. In addition, McLaren and his staff visited seven or eight drug clinics in the City and discussed with some of the leading experts in the field the possibility of hiring participants in methadone maintenance programs. (R. Tr. 10/25/74, pp. 501, 502, 508, 510, 534)

Through these investigations and consultations, the Transit Authority learned that the rate of return to drug and alcohol abuse among methadone patients was very

high, while the rate of entry into a stable way of life was very low, that patients on methadone maintenance programs required extensive psychological reorientation as part of the treatment program, that the methadone clinics regarded their medical records as confidential and did not make material information concerning their patients available to employers, that the clinics themselves were not adequately regulated, and that many of the clinics were unreliable both in terms of the quality of the services provided to the patients and the information provided to employers. (R. Tr. 10/25/74, pp. 535-544)

The Transit Authority also took into consideration the scope and complexity of the transit system and the deployment of personnel throughout the system, the concern for the safety of passenger services and for maintaining public confidence in the transit system. (R. Tr. 10/25/74, pp. 552-554)

The Transit Authority discounted private industry's limited experience with employment of methadone patients as irrelevant because, as a public employer, the Authority must hire through the civil service system and cannot engage in the small, selective pilot programs adopted by some private companies. In addition, it is fairly simple for a private company to terminate an employee who proves unsatisfactory, whereas in public employment, once the employee has completed a brief probationary period, he cannot be terminated without a formal disciplinary hearing. (R. Tr. 10/25/74, pp. 536-537)

In light of all of the foregoing considerations, the Transit Authority concluded that it would be unwise to exempt methadone maintained patients from the prohibition against the employment of drug users.

The Nature of Methadone Treatment

Methadone treatment is appropriate only for people addicted to heroin. It is a treatment specifically for chronic heroin addicts, i.e., people who have illegally injected heroin into the bloodstream several times a day for at least two years. (R. Tr. 10/22/74, pp. 13, 58)

Methadone is an opiate drug which produces addictive effects in every way similar to the effects of heroin. (R. Tr. 10/22/74, pp. 62-64) If injected into the bloodstream with a needle, or taken orally in large doses, it will produce essentially the same effects as heroin. (R. Tr. 1/7/75, p. 41; 1/28/75, pp. 633-637). When controlled doses of methadone are taken by mouth, the drug is absorbed into the bloodstream over a period of time, rather than sent rapidly into the bloodstream as is the case when a drug is injected. As a result, the concentration of methadone in the blood remains at a stable level for about twenty-four hours, and the individual does not experience the extreme highs and lows associated with heroin use. (R. Tr. 1/7/75, pp. 9-11)

When methadone is ingested in sufficiently high doses, it produces a tolerance or resistance which prevents the methadone user from experiencing any "high" from injecting heroin. (R. Tr. 1/9/75, p. 187) This effect of methadone relates solely to heroin. Methadone has no effect whatever on the use of alcohol, barbiturates, amphetamines or any other types of drugs. (R. Tr. 10/22/74, p. 92)

Methadone is used both in detoxification programs and in methadone maintenance programs. In short-term detoxification programs, the heroin addict is transferred from heroin to methadone, with the doses of methadone gradually reduced to zero over a three week period. Under this procedure, the patient is detoxified from both heroin

and methadone. As indicated in the District Court opinion (399 F. Supp. at p. 1038), this detoxification procedure frequently is unsuccessful, with patients returning to heroin use.

The treatment of heroin addiction by means of maintenance on methadone, rather than by detoxification, was originated by Dr. Vincent Dole during the 1960s. Dole's theory, in essence, was that through the use of carefully controlled doses of methadone, the craving for heroin could be blocked, and that this heroin block, maintained through continued methadone usage, and combined with extensive social and psychological rehabilitative services, could enable the heroin addict to establish a relatively normal life. (R. Tr. 1/7/75, pp. 7-8, 14)

In 1969-1970, methadone maintenance began to be more widely used in the treatment of heroin addicts. (R. Tr. 10/25/74, p. 366) In 1974, at the time this case was tried, there were approximately 40,000 patients in methadone maintenance programs in the City of New York. Of these, approximately 26,000 were treated in public or semi-public programs, and about 14,000 were treated in private programs. The public and semi-public programs are financed almost entirely by federal, state and city grants.

As indicated in the District Court's opinion (399 F. Supp. at p. 1040), the major public and semi-public methadone maintenance programs in New York City are the Beth Israel program, the New York City program, the Bronx State Hospital program, the Addiction Research and Treatment Center (ARTC) program, and the New York State Drug Abuse Control Commission (DACC) program.

Regulations concerning methadone treatment were promulgated by the United States Food and Drug Administra-

tion effective March 1973. (21 CFR § 130 et seq.) Similar regulations were promulgated by the New York State Drug Abuse Control Commission in May 1974. (14 NYCRR Part 2021) Prior to July 1974, the regulation of methadone clinics in New York City was the responsibility of the FDA. Thereafter, DACC took over that responsibility. (R. Tr. 1/28/75, p. 614)

There are essentially two types of methadone maintenance programs—the “high dose” and the “low dose” programs. Detoxification is not one of the goals of the high dose programs. In this type of program, which is espoused by Dole and used in the Beth Israel program, the central goal is to enable the patient to live a relatively normal life, despite the fact that this may require a lifelong dependence on methadone. (R. Tr. 1/7/75, pp. 80, 117, 118; 10/22/74, pp. 19, 20) Sufficiently large doses of methadone (in the range of 80-100 milligrams per dose) are administered to establish an effective resistance to heroin, and no emphasis is placed on future discontinuance of methadone. (R. Tr. 1/7/75, pp. 78, 80; 10/25/74, pp. 379-380) Dole expressed opposition to governmental policies which established detoxification as an obligatory goal. (R. Tr. 1/7/75, p. 78)

In low dose programs, where the dosage is in the range of 40 milligrams per dose, the principal goal is detoxification. Proponents of low dose programs, including Dr. Beny J. Primm and Dr. Irving Lukoff of Addiction Research and Treatment Corp., criticized the high dose programs which place patients on methadone indefinitely, because “our experience with methadone is not that long. The long-term effects are simply still an unknown element. It is still a powerful drug and the less you can give and get away with the better off you are.” In addition, they consider that it is easier to detoxify a person from a lower

methadone dosage. (R. Tr. 10/25/74, p. 459; 1/27/75, pp. 481, 482)

Finally, there are the non-methadone, residential drug-free programs such as Phoenix House and Odyssey House which are based on the premise that the problems underlying drug abuse are psychological in nature. Dr. Mitchell S. Rosenthal, the director of Phoenix House, expressed the view that methadone has been “overpromoted” as a method of dealing with the problems of drug abuse. He testified that it is necessary to work with a patient over a long period of time—generally eighteen to twenty-four months—“in order to undo the kinds of emotional problems that have led to drug abuse,” and to help the patients “to develop new kinds of inner resources so that they can remain drug-free.” (R. Tr. 1/10/75, pp. 409, 428a)

In the high dose and low dose programs, methadone treatment requires the patient to appear at the clinic, take an oral dose of methadone, and participate in a counseling and rehabilitation program. (R. Tr. 10/22/74, p. 15)

The heroin addict who enters a methadone program is given progressively larger doses of methadone until he is brought up to a stabilizing fixed dose on which he is then maintained for an indefinite period of time. This stabilizing process takes about 8-10 weeks. (R. Tr. 1/27/75, p. 547) Patients who are stabilized at a high dose level generally are more resistant to heroin usage than patients stabilized at a low dose level. (R. Tr. 1/9/75, p. 187) Federal regulations require the patient to come to the clinic for dosage a minimum of six days a week for the first three months. As time goes on, if the patient appears to make progress, i.e., adheres to the rules of the clinic and appears to make changes in his way of life, the requirement to appear at the clinic is relaxed to five times a week, then four, then

three. After a minimum of two years on the program, the patient may be permitted to reduce his visits to the clinic to twice a week. Patients who are not required to visit the clinic every day, come in on their scheduled day, drink the day's dose of methadone at the clinic, and take home the doses for the other days. (R. Tr. 1/10/75, pp. 334-336)

In addition to the daily dosage of methadone, patients are expected to participate in counseling sessions. The counseling is necessary because, in Dr. Dole's words, the heroin addict is "a social casualty" and the drug addiction is only a part of the total problem. (R. Tr. 1/7/75, p. 15)

Similarly, Dr. Robert L. DuPont, Jr., Director of the Special Action Office for Drug Abuse Prevention in the Executive Office of the President, testified that the heroin addict typically does not have a job and has a very chaotic personal life. (R. Tr. 10/22/74, pp. 15-16) The District Court opinion noted that "there is substantial agreement that many persons attempting to overcome heroin addiction have psychological or life-style problems which reach beyond what can be cured by the physical taking of doses of methadone." (399 F. Supp. at p. 1039)

With regard to the counseling and rehabilitation program, the clinics do not require the patient to see the counselor a specific number of times a week. In the first eight to ten weeks, the patient may see a counselor every day. Thereafter, he might see a counselor once a week. (R. Tr. 1/27/75, p. 534) While counseling is considered a major aspect of methadone maintenance programs, there was considerable testimony to the effect that little counseling actually occurs. Dr. Rosenberg of Phoenix House and Dr. Judianne Densen-Gerber of Odyssey House testified that while methadone clinics theoretically recognize the need for rehabilitative services, in practice "the majority of

them do very little other than supply the methadone." (R. Tr. 1/10/75, p. 424; 1/28/75, p. 755) Similarly, Dr. James C. Higgins, a consultant to various Veterans Administration hospitals, testified that the methadone patients generally do not avail themselves of the counseling services at the clinics. (R. Tr. 1/10/75, p. 458) Dr. Primm of ARTC confirmed that the extensive rehabilitation and counseling services which the methadone programs profess to give are not actually provided, that on any given day approximately one-third of the patients fail to appear, that some who do come in, stay only for their methadone dosage and do not stay for counseling, and that the monitoring which is supposed to be done by the governmental regulatory agencies is lax. (R. Tr. 1/27/75, pp. 526-528)

The ARTC program has a ratio of forty patients to one counselor. (R. Tr. 1/27/75, pp. 528-530) The Beth Israel program has a ratio of fifty patients to one counselor, with the counselor seeing perhaps three or four patients in a day. (R. Tr. 2/3/75, p. 871) DACC requires a minimum patient-counselor ratio of 50 patients to one counselor. (R. Tr. 1/28/75, p. 691) On the other hand, Dr. DuPont testified that the typical caseload for a counselor should be about twenty patients. He added that there is considerable variation from one clinic to another regarding the specific credentials associated with counseling. (R. Tr. 10/22/74, p. 16)

Results of Methadone Maintenance Treatment

While a number of witnesses at the trial testified to the value of methadone maintenance as a treatment for heroin addiction, at the same time they acknowledged that methadone maintenance had serious limitations and uncertainties and that it failed to achieve its goal for the majority of patients.

Dr. Seymour Joseph, Deputy Commissioner of DACC, testified that about fifty percent of methadone patients "have appeared to do pretty well in a methadone maintenance treatment program" but that the other fifty percent are not suitable subjects for rehabilitation and should not be participating in the program. He testified that there are many individuals for whom methadone is inappropriate, and who, while participating in methadone maintenance programs, continue to steal, to be unproductive, to engage in multiple drug abuse, and to remain alienated from their families. (R. Tr. 1/28/75, pp. 629-630, 645-646, 677-678)

The affidavit of Dr. Daniel Redner, Director of the Jerome Avenue Clinic of the New York City Methadone Maintenance Program, introduced into the record by the respondents,* states that only ten patients out of six hundred in the entire Jerome Avenue Clinic were deemed to have achieved a sufficient level of responsibility and rehabilitation after two years in treatment to qualify for reduction of their mandatory clinic visits to two days a week.

Both Dr. Primm and Dr. Higgins testified to the disruptive behavior of many patients at the methadone clinics, including gathering outside the clinic and exchanging drugs and alcohol with each other. (R. Tr. 1/10/75, pp. 453-456; 1/27/75, pp. 535-537) In addition, Dr. Joseph and Dr. Harold J. Trigg, Chief of the Methadone Maintenance and Drug Addiction Services at Beth Israel Medical Center, testified to the problems connected with the take-home doses given to many patients. Dr. Joseph testified

* Respondents' Redner affidavit is Appendix D to the Memorandum in Support of Plaintiff's Motion to Supplement and Modify the Court's Order of May 20, 1976. The affidavit appears in the Circuit Court Appendix at pp. 404-406.

that if a patient had been evaluated improperly and had not attained a sufficient level of responsibility before being given the privilege of taking home medication, he might get outside the clinic door and drink all the take-home doses at once. (R. Tr. 1/28/75, pp. 637-640) Dr. Trigg testified that there is a "sizable problem" of methadone patients selling their take-home doses on the street. (R. Tr. 1/10/75, pp. 326, 327)

Dr. DuPont testified that for some patients, methadone maintenance is an interim step toward total detoxification. However, many patients require continued methadone use for many years. He said that as long as these stabilized patients remain on methadone, they are able to lead relatively normal lives. However, when they stop taking methadone, they suffer the same withdrawal symptoms as heroin addicts, often experience a deterioration in their lives, and revert to heroin use. (R. Tr. 10/22/74, pp. 19-20, 27)

Dr. Lowinson of Bronx State Hospital testified that the demands of methadone maintenance are "rigorous," since under federal regulations, the patient must continue to report to the clinic at least twice a week for as long as he remains on the program. She stated that "this can prove to be a burden and it drives patients out of treatment." (R. Tr. 2/7/75, p. 1143) Similar observations were made by Dr. Dole. (R. Tr. 1/7/75, pp. 29-30)

Dr. Dole had no information on what percentage of his patients had successfully detoxified and remained drug free for one year, nor did he have any data on the current status of patients who had been in methadone treatment and then left it. (R. Tr. 1/7/75, p. 124)*

* More recently, Dr. Dole published an article in the Journal of the American Medical Association (Vol. 235, No. 19, May 10,

With regard to detoxification, the little data available indicated that the number of people who successfully detoxified from methadone was very small. (R. Tr. 10/22/74, pp. 20-22) In the Bronx State Hospital program, 10% of the methadone patients became drug free. (R. Tr. 2/7/75, pp. 1142-1143) Likewise, in the St. Luke's Hospital methadone program, 10% of the methadone patients were successfully detoxified and the rest had to be placed back on methadone. (R. Tr. 1/9/75, p. 280) Similar results were experienced in the Beth Israel program. (R. Tr. 2/3/75, p. 922) Dr. DuPont testified that past studies had been done which indicated a very high relapse rate to heroin by people who had left methadone programs. (R. Tr. 10/22/74, p. 21)

Alcohol and Drug Abuse

There was general agreement among the expert witnesses at the trial that there was "very substantial" drug and alcohol abuse by patients on methadone maintenance. (R. Tr. 1/10/75, pp. 417-419, 453-454; 1/27/75, p. 508; 1/28/75, p. 677; 2/12/75, pp. 1390-1392)

A well known study by Drs. Chambers and Taylor indicated that 97.4% of methadone patients in treatment at least fourteen months had used illicit drugs sometime in the course of a selected one month period. While Dr. DuPont

1976), in which he cited a recent sample study of 204 persons who had left treatment two years earlier. Of the 204, 138 had relapsed to the use of illicit opiates, 32 were seriously alcoholic, 16 were addicted to sedatives or using cocaine, 53 had been arrested, 19 had died, and only 22 could be classified by even a lenient standard as being in satisfactory status. The "lenient standard" referred to in the article did not involve an evaluation of the former patients in terms of their ability to function in society. The article defined "lenient standard" as follows: "[T]hey have no legal problems, and deny use of opiates or other major drugs of abuse and alcoholism."

questioned the accuracy of the Chambers-Taylor report, he himself had found that among methadone patients in treatment an average of eleven months, 42.6% had used illicit drugs, principally amphetamines, at least once in the course of a one month period. DuPont added that a former heroin addict on methadone is more likely to abuse drugs than a person with no history of addiction. (R. Tr. 10/22/74, p. 101) Dr. Rosenthal testified that about 70% of methadone patients abuse other drugs while in methadone programs. (R. Tr. 1/10/75, pp. 417-419)

In this regard, the statistics relied on by the District Court are misleading because they are limited to patients who have been in methadone programs at least six months. (399 F. Supp. at p. 1046) The Court cited the testimony of Dr. Trigg that of the 6500-7000 patients in the Beth Israel methadone program at the end of December 1974, approximately 5000 had been in the program for one year or more, and of that number, about 70-75% were free of illicit drug use. While the District Court apparently regarded these statistics as indicative of the success of the program, they in fact disclose that only about 3500 of the 6500-7000 methadone patients in the Beth Israel program were free of illicit drug use. The District Court used the same approach in evaluating the statistics on drug abuse at the other major clinics. For patients who had been in the City methadone program and the Bronx State Hospital program more than six months, 21% and 23% respectively showed signs of drug and alcohol abuse. The court did not indicate what the percentage of drug abuse was for patients who had been in those programs less than six months. The court similarly cited the ARTC program data to the effect that among patients who had been in treatment a year or more, 60-70% were free of drug or alcohol abuse. There were no statistics as to the rate of alcohol and drug abuse among

the ARTC patients who had been in treatment less than one year.

Thus, the District Court's statistical analysis failed to deal with the total picture of drug and alcohol abuse by methadone patients. In addition, even in the case of those patients who had been in treatment at least six months, and therefore were in the group regarded by the clinics as having the best chance of achieving stability, the statistics cited above show that between 20 and 40% showed signs of alcohol and drug abuse.

Employment

There was considerable testimony as to the serious risks involved in the employment of methadone patients. Drs. Dole and Gollance testified that a patient in the first few months of methadone maintenance is "in a risky situation" and not ready for stable employment. (R. Tr. 1/7/75, pp. 89-90; 1/9/75, p. 155)

Dr. DuPont testified that the employer faces the risks involved in hiring a person who has once "gotten off the track" and who may feel pressure to relapse to heroin and the "lure of the street, the tendency to backslide," including the crime associated with the acquisition of heroin. (R. Tr. 10/22/74, pp. 42, 49) DuPont stated further that it would require a "leap of faith" for an employer to hire a methadone patient who did not have a recent work history. (R. Tr. 10/22/74, p. 41)

With regard to the types of patients enrolled in the clinics, Dr. Lukoff of ARTC testified that about one-third of the patients had become heroin addicts at a very early age—15, 16, 17—and were usually "the most criminal," least educated and least likely to have family ties. About

40-45% of this group dropped out of the methadone programs by the end of the first year. Lukoff stated that the other two-thirds had become addicts at about age 21, and tended to have been in school, to have held jobs, been in the military, married; that this group was more amenable to goals of rehabilitation. (R. Tr. 1/9/75, pp. 266-273) According to Drs. Lukoff and DuPont, approximately one-third of the heroin addicts who enter methadone maintenance programs drop out within the first year. This process was characterized as a "self-cleansing" process. Of the remaining two-thirds of the patients, they considered approximately one-half to two-thirds to be employable. (R. Tr. 10/22/74, p. 121; 1/9/75, pp. 273, 274, 283, 284; 2/12/75, p. 1408)

Dr. Trigg disagreed with Dr. Lukoff's statement that a substantial number of heroin addicts entering methadone programs had stable family relationships and had been able to keep jobs. Trigg testified that 99% of heroin addicts are not able to work, have no desire to work while they are on heroin, and that one of the "cardinal symptoms" of heroin addiction is that a person is not holding down a job. (R. Tr. 1/10/75, pp. 321-323)

Dr. Trigg testified that of the entire methadone patient population in the Beth Israel program, about 33% were employable. (R. Tr. 1/10/75, p. 345) Dr. Joseph of DACC testified that about 50% of the patients in his program would be considered employable. (R. Tr. 1/28/75, pp. 645, 646)

The District Court opinion cited a statistical study conducted by Dr. Frances Gearing of the Columbia School of Public Health which found that 59% of the patients studied were gainfully employed. (399 F. Supp. at p. 1047) However, the court's opinion failed to note that Dr. Gearing's

study was structured in such a way as to reflect only those patients who remained in treatment for a substantial period of time. (R. Tr. 10/30/74, pp. 862-865) The study did not give an accurate picture of the employability of the total methadone clinic population. The validity of Dr. Gearing's reports was questioned by Dr. Lukoff, who observed:

"I think there are problems connected with the way she handled the data which probably exaggerates success to some extent. . . . It exaggerates, perhaps, the success because you're dealing only with survivors in the program and the survivors in the program are generally your better patients. If you want to understand the full impact of the treatment on the addict population, that's another question altogether and requires a different kind of answer." (R. Tr. 10/25/74, pp. 467, 468)

The other statistics cited by the District Court on the question of employability similarly glossed over the fact that they related to patients who had been participating in methadone programs for a minimum of six months to one year. (R. Tr. 1/27/75, pp. 514, 515; 2/12/75, p. 1408)

In its analysis of the employability of methadone maintained patients, the District Court repeated the type of analysis it had made in connection with alcohol and drug abuse, viz., it relied on statistics which were limited to patients who had been participants in methadone programs for a substantial period of time, and failed to deal with the question of the employability of the total patient population of the methadone clinics.

In addition, even within the group characterized by the clinics as successful methadone patients, the statistics cited above show that from 30-50% were considered by the clinics to be unemployable.

The respondents introduced into evidence recent policy statements of the New York City and New York State Personnel Departments encouraging the employment of drug-free former addicts and methadone patients. (P. Exs. 7 and 11, R. Tr. 10/22/74, pp. 159, 161, appearing in Circuit Court Appendix at pp. 2694 and 2739) No testimony was presented by the respondents with regard to any experience public employers might have had with the employment of methadone patients through the civil service system.

The District Court's recital of the successful employment of methadone patients by various private employers does not withstand examination. The list of such companies cited in the court's opinion (399 F. Supp. at p. 1047) was derived from a mere list of corporate names furnished by representatives of some of the methadone clinics, without any specific supportive data. (R. Tr. 10/25/74, pp. 422, 423)

Eileen Wolkstein, Director of the Vocational Rehabilitation Department at Beth Israel, recited a list of large companies participating in pilot programs of employment of methadone patients. (R. Tr. 10/25/74, pp. 422, 423) However, when asked for specific information concerning the success or failure of those programs, she was able to cite only a study of twenty-six methadone patients hired by private companies. This group of twenty-six had been carefully pre-screened, had to have been on methadone maintenance a minimum of nine months, free of any drug abuse, with a demonstrated ability to work, very recent significant work history, and no outstanding medical problems. (R. Tr. 10/25/74, pp. 428-432) As indicated by Dr. Dole, the patients in the Wolkstein study were a very select minority of methadone patients. (R. Tr. 1/7/75, pp. 105-106) Over the course of fifteen months of employ-

ment, six people in this carefully selected group of twenty-six became the subject of disciplinary proceedings for excessive lateness and absence, and one was fired. (R. Tr. 10/25/74, pp. 430, 447, 448)

The testimony of the various corporate representatives produced at the trial by the respondents made it clear that their experience was limited to small pilot programs involving the employment of carefully selected rehabilitated drug addicts, very few of whom were methadone patients.

Charles D. Ades of Chemical Bank testified that his company had hired thirteen carefully screened former drug addicts, only three of whom were methadone patients. Twenty months later, four had been fired, one for drug abuse and three for poor attendance. The one who was fired for drug abuse was one of the three methadone maintained persons. (R. Tr. 10/24/74, pp. 338, 341, 344-348, 353-354)

The official of the Sheetmetal Workers International Association, cited by the District Court as testifying that the Association was "bringing methadone maintenance patients into its apprenticeship program" (399 F. Supp. at p. 1047), testified that over a three year period, he had hired a total of six persons who were enrolled in a methadone maintenance program for at least six months. (R. Tr. 10/24/74, pp. 335, 337)

Henry D. Biggart of the Off-Track Betting Corporation testified that OTB had undertaken a special program to hire people with a history of drug addiction, and that in the course of this effort, it had hired a total of 39 ex-addicts, 20 of whom were methadone patients, into part-time positions. (R. Tr. 10/29/74, p. 663)

Thomas J. Doyle of Consolidated Edison Company testified that his company had hired about one hundred former drug abusers. He did not indicate how many of that group were drug free and how many were methadone maintained patients, stating only that "few" methadone patients had been discharged from employment. He had specific data only with respect to thirteen "very select" methadone patients who, he testified, were performing well. He stated that applicants were carefully screened, and that "when applicants met our standards of proven stable rehabilitation, their success rate was about 65% over a two year period." (Pl. Ex. 39, R. Tr. 10/25/74, p. 568, appearing in Circuit Court Appendix at pp. 1145-1148)

Paul J. Kolisch of Bernzomatic Corp. testified that he had hired nine drug free former addicts referred by a local rehabilitation center. All were temporarily hired for a period of one to six months as part of a rehabilitation program. None of these individuals was a methadone patient. (R. Tr. 10/29/74, pp. 577-587)

James Peterson of Kennecott Copper Company testified that his company maintained an in-house drug counseling program for employees with drug problems. He did not know how many, if any, persons in the program were methadone patients. (R. Tr. 10/29/74, pp. 590-595)

Determination of Employability

The record in this case does not support the statement of the District Court that the Transit Authority can determine the employability of methadone patients by its usual screening procedures. (399 F. Supp. at p. 1048) On the contrary, the expert witnesses agreed that a methadone patient who applies for employment involves special risks for the employer, and that in order to make a judgment

regarding employability, the employer would need an unusual amount of advice and help. (R. Tr. 1/7/75, p. 97; 1/9/75, p. 155; 1/28/75, pp. 684-685) The expert witnesses were not in agreement as to how the employer would go about obtaining such advice and help.

Drs. Dole and Gollance suggested that the employer consult "a good experienced person in a methadone clinic or a consultant with broad experience in the field of addiction with knowledge of methadone treatment." (R. Tr. 1/7/75, p. 97; 1/9/75, p. 155) The quality of the evaluation obtained of course would depend on the quality of the person making the evaluation. (R. Tr. 1/9/75, pp. 169-170)

Dr. Trigg did not agree that the Transit Authority should refer a methadone patient to a consultant for evaluation, stating "I am not sure that that is sufficient insurance for the TA." He testified further that while the Transit Authority could get information from the clinics, a better procedure "that would perhaps give the TA greater insurance as to what it was getting" would be a certification board that would evaluate both the clinics and the patients. (R. Tr. 1/10/75, p. 347) Such a certification board was created in 1969-1970, but through lack of official governmental support, it ceased to function after a short period of time. (R. Tr. 1/10/75, pp. 445-450) As a possible alternative to a certification board, Trigg suggested that the employer could consult "a panel of experts—primarily physicians." (R. Tr. 2/3/75, p. 852)

Dr. DuPont testified that the clinics could be useful to the employer, but that they "obviously are interested in placing people in employment, so that the employer has to make his own independent judgment." (R. Tr. 10/22/74, pp. 38, 39)

Thus, the options available to the Transit Authority would be to place a heavy reliance on the recommendations of the employees of the methadone clinics, or to hire a panel of medical consultants to evaluate methadone applicants.

The problems of evaluating methadone patients are compounded by federal regulations declaring the records of methadone clinics to be confidential. (42 CFR § 2.1 et seq.) Under these regulations, no information may be given to an employer by the clinic without the consent of the methadone patient. (42 CFR § 2.31) Even where the patient's consent is obtained, the clinic's disclosures to the employer "should be limited to a verification of the patient's status in treatment or a general evaluation of progress in treatment." (42 CFR § 2.38(c)) More specific information may be given only if:

"The program has reason to believe, on the basis of past experience or other credible information (which may in appropriate cases consist of a written statement by the employer), that such information will be used for the purpose of assisting in the rehabilitation of the patient and not for the purpose of identifying the individual as a patient in order to deny him employment or advancement because of his history of drug or alcohol abuse." (42 CFR § 2.38(d)(1))

By virtue of these confidentiality requirements, all of the experts questioned at the trial testified that the only information the clinics would provide to the employer would be the patient's attendance at the clinic and the counselor's evaluation of the patient's progress. (R. Tr. 10/29/74, p. 663; 1/9/75, pp. 176, 177; 1/28/75, p. 670; 2/3/75, pp. 1060-1061) Dr. DuPont stated that methadone clinics are prohibited from informing the employer of evidence that the patient is using illicit drugs. He added that it would be con-

trary to federal policy regarding confidentiality for an employer to try to make it a condition of employment that the clinic advise the employer of any illicit drug use. (R. Tr. 10/22/74, pp. 104-107, 111, 112)

Consequently, the employer would be hiring the methadone patients on the basis of conclusory statements by clinic personnel without specific supportive data. In addition, after hiring the methadone patient, the employer would not be able to obtain specific data concerning the patient's performance in the methadone treatment program, unless the employer made the written commitment, specified in the federal regulation, that such information would not adversely affect the patient's employment. An employer unwilling to make such a commitment is burdened with the necessity of maintaining an ongoing surveillance of the employee, including frequent urinalyses to detect drug abuse.

The Transit Authority's Policy Regarding Alcohol

The District Court placed considerable emphasis on differences between the Transit Authority's policy regarding the employment of alcoholics and its policy regarding the employment of drug addicts.

The court acknowledged that the Transit Authority refuses to consider for employment any applicant who has an alcohol problem. (399 F. Supp. at p. 1056) Thus, the Authority's policy with regard to applicants for employment who have alcohol problems is identical with its policy with regard to applicants who have drug problems.

The difference noted by the District Court was that "the TA is willing to continue in employment a substantial number of persons with existing alcohol problems." (399 F. Supp. at p. 1056)

With regard to current employees, Rule 11(a) of the Transit Authority's Rules and Regulations prohibits Authority employees from drinking alcoholic beverages during their tours of duty or at any time to an extent making them unfit to report for duty or to be on duty. (Pl. Ex. 58, appearing in Circuit Court Appendix at p. 2798) Rule 11(a) is not limited to alcoholics, but covers individual instances of drinking.

Employees suspected of violation of Rule 11(a) are subjected to disciplinary proceedings which may result in suspension and dismissal. (A pp. 96A-99A) If an employee against whom such charges are sustained at a trial board hearing, has less than three years of service and holds a position in which he is directly engaged in operations, such as Motorman, Conductor or Bus Operator, he will be dismissed. If the employee violating Rule 11(a) holds such an operating position and has more than three years of service, he will be demoted to a non-critical position. If the employee violating Rule 11(a) holds a non-critical position, he is given a hearing and is subject to discipline. (A pp. 96A-99A)

All employees found in violation of Rule 11(a) are referred to the Transit Authority's Employee Counseling Service, an organization in existence within the Authority since 1956, which provides assistance to employees with drinking problems. Employees may also voluntarily seek such assistance. If the Service determines that persons referred to it have alcoholism problems, they are invited to participate in the Service's program which requires consistent attendance at a specified number of Alcoholics Anonymous meetings, together with regular reporting to the Counseling Service. (A pp. 99A-100A)

The Transit Authority's Executive Officer, Wilbur B. McLaren, testified that the alcoholism program had been in effect for many years, that it had been partially successful, but that the Authority had many problems connected with the program. He testified that it was "beyond [the Authority's] capability" to take on a drug problem in addition to the problems presented by the alcoholism program. (R. Tr. 10/25/74, pp. 554-556)

The Decisions Below

The District Court found, under 42 U.S.C. § 1983, that the Transit Authority's exclusion of present and past methadone maintained persons from employment was a violation of the due process and equal protection clauses of the Fourteenth Amendment. (399 F. Supp. 1032) The Court subsequently issued an Amended Permanent Injunction and Judgment (Petition for Certiorari, Appendix E, p. 75a) in which it ordered the Authority to give individual consideration to each methadone maintained employee or applicant for employment and awarded back pay.

Thereafter, the District Court issued a supplemental opinion finding the Transit Authority guilty of discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., as amended, for the sole purpose of establishing jurisdiction to award attorneys' fees. (414 F. Supp. 277) Following enactment of the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988, the District Court issued the aforesaid Amended Permanent Injunction and Judgment (Petition for Certiorari, Appendix E, p. 75a) basing its award of attorneys' fees on that Act. The attorneys' fees awarded by the District Court were in the sum of \$375,000 for legal services performed up to January 24, 1977.

The United States Court of Appeals, Second Circuit (558 F.2d 97), affirmed the opinion of the court below under 42 U.S.C. § 1983, except that it reversed the dismissal as to three of the named plaintiffs, remanded the case to the District Court for determination of positions to which those plaintiffs should be reinstated and the amount of back pay due them, and deducted \$50,710 from the attorneys' fees awarded. The Second Circuit found it unnecessary to reach the Title VII question because before the decree became final, Congress enacted the Civil Rights Attorneys' Fees Awards Act of 1976, thereby providing an alternative basis for the attorneys' fees award.

Summary of Argument

I.

The Transit Authority's denial of employment to former heroin addicts participating in methadone maintenance programs is not an unconstitutional denial of due process and equal protection under the Fourteenth Amendment.

The employment sought in this case is not a fundamental right, deprivation of which could be justified only by a compelling state interest. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). Nor is the class involved herein, former heroin addicts in methadone maintenance programs, within the suspect categories which have been enumerated by this Court (e.g. race, *Korematsu v. United States*, 323 U.S. 213 [1944]; alienage, *Graham v. Richardson*, 403 U.S. 365 [1971]; ancestry, *Oyama v. California*, 332 U.S. 633 [1948]; and wealth in the context of criminal proceedings, *Griffin v. Illinois*, 351 U.S. 12 [1956]).

Since the case at bar involves neither a suspect classification nor a fundamental right, the traditional or "restrained" standard of review should be applied under the guidelines of *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

The courts below evaluated the Transit Authority's employment policy in terms of incorrect standards of judicial scrutiny. In concluding that this policy was an unconstitutional denial of due process and equal protection under the Fourteenth Amendment, both the District Court (399 F. Supp. at p. 1058) and the Circuit Court (558 F.2d at p. 99) expressly relied on cases (principally *Sugarman v. Dougall*, 413 U.S. 634 [1973] and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 [1974]), which had applied the strict scrutiny standard reserved for cases involving a suspect classification or a fundamental interest.

As an agency charged with the responsibility for providing safe, prompt and dependable transportation to the people of the City of New York, the Transit Authority's objective is to employ persons in all job categories who are reliable, not only in terms of safety standards, but also in terms of attendance, punctuality, and general ability to function well in the routine and challenge of daily work. The Transit Authority weighed these concerns together with consideration of the weaknesses in implementation of methadone maintenance programs by the methadone clinics, the controversy within the drug addiction field concerning the efficacy of methadone treatment, the unemployability of the majority of methadone patients, the difficulties facing the employer in attempting to evaluate the employability of methadone patients and in monitoring methadone patients after employment to determine continued employability, and the rigidity of the civil service system which re-

quires formal disciplinary proceedings in order to terminate the employment of unsatisfactory employees who have acquired tenure after a brief probationary period.

Each of the foregoing reasons was amply supported by the testimony of the various expert witnesses at the trial. However, by reason of their application of the strict scrutiny standards, the courts below erroneously emphasized the beneficial results of methadone maintenance for a minority of methadone patients, and ignored the body of evidence demonstrating the uncertainties and failures of methadone maintenance for the majority of methadone patients.

While the evidence indisputably demonstrated that the majority of methadone maintained patients are unemployable, the courts below focused their attention on the minority of such patients who are employable. They gave no weight to the substantial difficulties facing the employer in evaluating the employability of methadone maintained patients.

The record in this case demonstrates the rational basis for the Transit Authority's policy, and the absence of the invidious discrimination necessary for a finding of unconstitutionality under the traditional standard of scrutiny. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976); *Dandridge v. Williams*, 397 U.S. 471 (1970). There is no basis for the finding of unconstitutionality.

II.

The District Court ruled that the Transit Authority's policy of excluding methadone maintained persons from employment had a disparate impact on Blacks and Hispanics and therefore constituted unlawful employment dis-

crimination in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e) as amended. The ruling was made for the express and sole purpose of establishing jurisdiction for an award of attorneys' fees.

A finding of unlawful discrimination under Title VII should not be made against a government agency such as the Transit Authority merely on the basis of disparate impact without proof of discriminatory intent.

The 1972 amendment to Title VII, extending its jurisdiction to state and local government, was based on the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 (1976) In *Washington v. Davis*, 426 U.S. 229 (1977), this Court made clear that in discrimination claims arising under the Fourteenth Amendment, proof of purposeful discrimination is required.

A statute cannot be construed more broadly than its constitutional base. To the extent that Title VII asserts jurisdiction over the employment practices of government employers, it must be construed in accordance with the Fourteenth Amendment standard for evaluating discrimination claims, i.e., there must be proof of racially discriminatory purpose. In the case at bar, the District Court acknowledged that the Transit Authority's employment policy was not adopted with a racially discriminatory purpose. Accordingly, the finding of unlawful discrimination was improper.

Even if a violation of Title VII could be established against a government agency employer on the basis of disparate impact without proof of discriminatory intent, the evidence in this case was totally inadequate to support the finding of discrimination.

The District Court found disparate impact solely on the basis of statistics purporting to show (1) that of the employees referred to the Transit Authority's medical consultant for suspected violation of its drug policy, 81% were Black and Hispanic and 19% were white; and (2) that between 62% and 65% of methadone maintained persons in New York City are Black and Hispanic.

The first set of statistics is irrelevant in the context of this case, since it did not include any methadone maintained persons, nor did it indicate how many, if any, of the persons referred to the medical consultant, were discharged from employment. In addition, the statistics were compiled on the basis of a total number of fifty-four individuals referred to the medical consultant over a period of twenty-six months. The group from which the statistics were derived was so small as to render the statistics virtually meaningless.

The second set of statistics purported to be based on a random sampling of the total methadone patient population in New York City. In fact, it covered only the patients treated at the public and semi-public methadone clinics. It did not reflect information on the patients treated at the various private clinics who make up over one-third of the total methadone patient population in New York City. In addition, although no more than 30-50% of methadone patients are employable, these statistics did not consider the employability of the sample. There were no statistics with regard to the racial or ethnic composition of that portion of the methadone patient population which could be considered employable.

The District Court refused to consider the Transit Authority's impressive work force statistics which show that 46% of the Authority's employees are Black and Hispanic,

and that these minority groups are employed throughout the Authority in all job categories. The District Court likewise refused to consider any of the evidence dealing with the obvious job-relatedness of the Authority's denial of employment to methadone patients. Instead, the Court placed its blind reliance on irrelevant and incomplete statistics. These statistics were totally inadequate to support a finding of disparate impact under Title VII. *International Brotherhood of Teamsters v. United States, et al.*, 431 U.S. 324 (1977); *Hazelwood School District, et al. v. United States*, 433 U.S. 299 (1977).

Even if a disparate impact had been shown, the finding of unlawful discrimination was unwarranted in light of the demonstrated business necessity for the Transit Authority's employment policy. The obvious job-relatedness of the policy, together with the substantial economic and administrative burden of attempting to evaluate the employability of individual methadone patients, and of maintaining continuing medical monitoring of methadone patients after employment, demonstrated the requisite business necessity. *United States v. State of South Carolina*, 445 F. Supp. 1094, 1115 (D.C.D. So. Car. 1977), *aff'd* — U.S. —, 98 S. Ct. 756 (1978).

No support exists in this case for liability under Title VII.

ARGUMENT

I.

The Transit Authority's denial of employment to former heroin addicts participating in methadone maintenance programs is not an unconstitutional denial of due process and equal protection under the Fourteenth Amendment.

The courts below found that the Transit Authority's denial of employment to former heroin addicts participating in methadone maintenance programs was an unconstitutional denial of due process and equal protection under the Fourteenth Amendment.* As defined by the District Court, the class represented by the named respondents consists of all those persons who have been or would in the future be subject to dismissal or rejection as to employment by the Transit Authority on the ground of present or past participation in methadone maintenance programs.

A. The strict scrutiny standard should not be applied in this case.

Equal protection issues are evaluated under either the traditional standard or the strict standard of judicial scrutiny.

Under the strict scrutiny standard, the governmental body must demonstrate that the classification being reviewed is based upon some compelling government inter-

* No procedural due process claim was made in this case. Respondents concede that tenured employees suspected of violation of the Transit Authority's drug rule are given a formal hearing in accordance with the requirements of State Civil Service Law, Section 75. (A pp. 93A-94A), see *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sinderman*, 408 U.S. 593 (1972).

est and is structured narrowly and with precision. The classification "is not entitled to the usual presumption of validity." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 16 (1973).

The strict scrutiny standard is appropriate "only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class," *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976); *San Antonio School District v. Rodriguez*, *supra*, 411 U.S. at p. 16.

The fundamental rights which this Court has declared subject to strict scrutiny are constitutionally protected rights and liberties, such as rights of a uniquely private nature, *Roe v. Wade*, 410 U.S. 113 (1973); the right to vote, *Bullock v. Carter*, 405 U.S. 134 (1972); the right of interstate travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969); First Amendment rights, *Williams v. Rhodes*, 393 U.S. 23 (1968); the right to procreate, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

This Court has specifically excluded governmental employment, such as that involved in the present case, from the fundamental right category, and has "expressly stated that a standard less than strict scrutiny 'has consistently been applied to state legislation restricting the availability of employment opportunities.'" *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

Consequently, the case at bar does not involve a fundamental right requiring application of strict scrutiny standards. Nor does the class involved herein, methadone users, constitute a suspect class within the contemplation of equal protection analysis.

The classes which have been designated as suspect, thereby warranting strict scrutiny, are those which are "saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio School District v. Rodriguez*, *supra*, 411 U.S. at p. 28. See also, *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, fn. 4 (1938).

Suspect classifications which have been enumerated by this Court are race, *Korematsu v. United States*, 323 U.S. 213 (1944); alienage, *Graham v. Richardson*, 403 U.S. 365 (1971) (but see *Foley v. Connelie*, — U.S. —, 46 U.S. L.W. 4237 [1978]); ancestry, *Oyama v. California*, 332 U.S. 633 (1948); and wealth in the context of criminal proceedings, *Griffin v. Illinois*, 351 U.S. 12 (1956).

Certain other classifications which seem to have been accorded some intermediate level of scrutiny, apparently because they share to a considerable extent the characteristics of the suspect categories, are sex, *Frontiero v. Richardson*, 411 U.S. 677 (1973) and illegitimacy, *Mathews v. Lucas*, 427 U.S. 495 (1976).

The class involved in the instant case, methadone users, has none of the "traditional indicia of suspectness" set out by this Court in *Rodriguez*, *supra*, at p. 28. The members of this class have not suffered a history of purposeful discrimination by reason of methadone use or been subjected to disabilities on the basis of immutable characteristics of birth. See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Whatever psychological or sociological factors allegedly lead an individual to heroin addiction and eventually to the use of methadone, the category of methadone user is not immutable and would include only those who

had participated in the voluntary, illicit use of a controlled substance, heroin. Methadone use does not create a "discrete and insular" group, *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, n.4 (1938) in need of the extraordinary protection of strict judicial scrutiny. There is no justification for adding this group to the suspect classifications which call for strict judicial scrutiny.

The strict scrutiny standard together with the traditional scrutiny standard discussed in subsection C, *infra*, form the "two-tier" standard of review of equal protection issues (see *Rodriguez, supra*, 411 U.S. at pp. 40-44; Justice STEWART Concurring Opinion, pp. 60-62; *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065 [1969]).

Several decisions of this Court have appeared to apply an additional standard of review, viz., an "irrebuttable presumption" formulation, to equal protection analysis, e.g. *Stanley v. Illinois*, 405 U.S. 645, 653 (1972); *Vlandis v. Kline*, 412 U.S. 441 (1973); *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973); and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). In these cases, the Court rejected legislative classifications which included irrebuttable presumptions of qualification. However, in *Weinberger v. Salfi*, 422 U.S. 749 (1975), the irrebuttable presumption decisions were explained in terms of strict scrutiny and traditional scrutiny standards. The Court characterized the decisions in *Stanley* and *LaFleur* as involving fundamental rights of family and childbearing, and the decisions in *Vlandis* and *Murry* as involving irrational classifications. *Salfi, supra*, at pp. 771-772. Accordingly, the irrebuttable presumption formulation appears to have been substantially curbed, if not entirely discarded.

Since the case at bar involves neither a suspect classification nor a fundamental right, the strict scrutiny standard should not be applied.

B. The courts below evaluated the Transit Authority's employment policy in terms of the strict scrutiny standard.

In concluding that the Transit Authority's denial of employment to former heroin addicts participating in methadone maintenance programs was an unconstitutional denial of due process and equal protection, both the District Court and the Second Circuit expressly relied on cases which had applied the strict scrutiny standard.

The principal cases cited by the District Court as "[d]ecisions dealing with the basic doctrines" were *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), and *Sugarman v. Dougall*, 413 U.S. 634 (1973). (399 F. Supp. at p. 1057) The Second Circuit likewise declared that the finding of unconstitutionality "rests on the solid foundation of *Sugarman v. Dougall* . . . and our own *Crawford v. Cushman*, 531 F. 2d 1114 . . ." (558 F. 2d at p. 99). Each of the cited cases had applied the strict scrutiny standard.

In *Cleveland Board of Education v. LaFleur*, a mandatory maternity leave case, this Court ruled that "there is a right 'to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child,'" and that "public school maternity leave rules directly affect 'one of the basic civil rights of man' . . ." (*LaFleur, supra*, 414 U.S. at p. 640). Thus, *LaFleur* dealt with governmental interference with a fundamental right, thereby calling for strict judicial scrutiny. (See *Weinberger v. Salfi*, 422 U.S. 749, 771

[1975].) *Crawford v. Cushman*, which declared unconstitutional a requirement for the discharge from employment of pregnant Marines, was based expressly on *LaFleur*. (531 F. 2d at pp. 1124-1125)

In *Sugarman v. Dougall*, this Court ruled that since aliens are a suspect class (*Graham v. Richardson*, 403 U.S. 365 [1971]), classifications based on alienage are subject to close judicial scrutiny. The Court found that New York's broad exclusion of aliens from employment in the competitive classified civil service could not withstand this close scrutiny. *Sugarman*, *supra*, 413 U.S. at pp. 642-643.

Immediately following its analysis of *LaFleur* and *Sugarman*, the District Court declared that "Under the above authorities," the Transit Authority's "blanket ban" against the employment of methadone patients violated the due process and equal protection clauses of the Fourteenth Amendment (399 F. Supp. at p. 1058). It is evident that the Court believed that the constitutional requirements for individualized employment policies expressed in *LaFleur* and *Sugarman* were equally applicable to the case at bar.

The District Court's misapprehension of the constitutional standards applicable to this case distorted its entire perception and evaluation of the evidence presented at the trial.

While the evidence clearly demonstrated the unemployability of the majority of methadone patients and the magnitude of the alcohol and drug abuse problem, the Court failed to deal with these issues in terms of the total patient population of the methadone clinics. Rather, it focused its attention on statistics which were limited to the more stable patients who had been participants in methadone programs for a substantial period of time. The Court similarly

glossed over the significant difficulties facing the employer in attempting to evaluate the employability of methadone patients. (See Statement of Facts, *supra*, pp. 24-26.)

Under the influence of the strict scrutiny standard, the District Court emphasized the beneficial results of methadone maintenance for a minority of patients in methadone maintenance programs, and ignored the body of evidence demonstrating the uncertainties and failures of methadone maintenance for the majority of such patients. The District Court's analysis was adopted by the Second Circuit on the appeal.

C. The Transit Authority's employment policy meets the test of rationality under the traditional standard of scrutiny.

Since this case involves neither a fundamental right nor a suspect category, the traditional standard of review should be used in evaluating the challenged classification.

The traditional or "restrained" standard of review utilizes a "relatively relaxed standard" under which the classification being considered is presumed to be valid. This standard of review requires only that the classification bear some rational relationship to legitimate governmental purposes. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 40-41 (1973).

In *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), this Court has said:

"... a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical

nicety or because in practice it results in some inequality.' *Lindsley v. Natural Carbonic Gas*, 220 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70. 'A statutory discrimination will not be set aside if *any state of facts reasonably may be conceived to justify it*.' *McGowan v. Maryland*, 366 U.S. 420, 426." (emphasis added)

As an agency charged with the responsibility for providing safe, prompt and dependable transportation to the people of the City of New York, the Transit Authority's objective is to employ persons in all job categories who are reliable, both in terms of safety standards, and in terms of attendance, punctuality, and general ability to function well in the routine and challenge of daily work.

The evidence in this case demonstrated the weaknesses in implementation of methadone maintenance programs by the methadone clinics, the controversy within the drug addiction field concerning the efficacy of methadone treatment, the unemployability of the majority of methadone patients, the difficulties facing the employer in attempting to evaluate the employability of methadone patients, and the difficulties involved in monitoring methadone patients after employment to determine continued employability. Many of these concerns were recognized by this Court in *Marshall v. United States*, 414 U.S. 417 (1974), in a decision rendered at about the same time as the trial being conducted in the case at bar. In *Marshall*, the Court observed that:

" . . . there is no generally accepted medical view as to the efficacy of presently known therapeutic methods of treating addicts and the prospect for the successful re-

habilitation of narcotics addicts thus remains shrouded in uncertainty. . . . As testimony before the Congress revealed, no evidence to date has demonstrated more than a speculative chance for the successful rehabilitation of narcotics addicts." 414 U.S. at p. 426.

These problems weighed together with the Transit Authority's responsibility for the safe, efficient and economical maintenance of a vast rapid transit system, its objective of employing persons able to meet reasonable standards of reliability, and the rigidity of the civil service system which requires formal disciplinary proceedings in order to terminate the employment of unsatisfactory employees who have acquired tenure after a brief probationary period, amply justified the Transit Authority's refusal to exempt methadone patients from its policy of barring drug users from employment.

In *Massachusetts Bd. of Education v. Murgia*, 427 U.S. 307, this Court reaffirmed the principle that under the traditional standard of scrutiny, perfection in establishing the classification is neither possible nor necessary. The Court found that a state statute providing for mandatory retirement of all uniformed state police officers at age 50 was not a denial of equal protection, stating:

"There is no indication that [the state statute] has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute." 427 U.S. at pp. 315-316.

While the State might not have chosen the best means to accomplish its objective of assuring physical fitness, the Constitution did not require it to determine fitness more precisely through individualized testing after age 50. *Murgia* at pp. 314, 316.

Similarly, in the present case, the fact that, *arguendo*, some methadone patients might be qualified to be Transit Authority employees in some positions would not render the Authority's general prohibition unconstitutional. The Transit Authority is not required to make individualized determinations when it "can rationally conclude not only that generalized rules are appropriate to its purposes and concerns, but also that the difficulties of individual determinations outweigh the marginal increments in the precise effectuation of [governmental] concern which they might be expected to produce." *Weinberger v. Salfi*, 422 U.S. 749, 785 [1975].

The fact that the Transit Authority has a program to assist certain employees with drinking problems does not require it to undertake a similar program for drug addicts. The Equal Protection Clause does not require the governmental body to "choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams*, 397 U.S. 471, 486-487 (1970). It is not required to deal with "all like evils, or none." *U.S. v. Carolene Products Co.*, 304 U.S. 144, 151 (1938).

The "leap of faith" (see Statement of Facts, p. 19, *supra*) that would be necessary for the Transit Authority to hire methadone patients is not constitutionally mandated. While employment opportunities may be an important aspect in the rehabilitation of drug addicts, there is no constitutional imperative requiring the Transit Authority to participate in that rehabilitation effort. As this Court observed in *Murgia, supra*, 427 U.S. at pp. 316-317:

"We do not make light of the substantial economic and psychological effects premature and compulsory retirement can have on an individual; nor do we denigrate the ability of elderly citizens to continue to contribute

to society. The problems of retirement have been well documented and are beyond serious dispute. But '[W]e do not decide today that the [Massachusetts statute] is wise, that it best fulfills the relevant social and economic objectives that [Massachusetts] might ideally espouse, or that a more just and humane system could not be devised'. . . We decide only that the system enacted by the Massachusetts Legislature does not deny appellee equal protection of the laws."

There does not exist in this case the "invidious discrimination" necessary to a finding of unconstitutionality under the traditional standard of scrutiny. *Dandridge v. Williams*, 397 U.S. 471, 483 (1970).

II.

The Transit Authority's denial of employment to former heroin addicts participating in methadone maintenance programs is not an unlawful racial discrimination under Title VII of the Civil Rights Act of 1964 as amended.

In a supplemental decision, the District Court found the Transit Authority guilty of unlawful discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., as amended. (414 F. Supp. 277) This decision was made for the express and sole purpose of establishing jurisdiction for an award of attorneys' fees. (414 F. Supp. at p. 278)*

* The Second Circuit (558 F.2d at pp. 99-100) found it unnecessary to reach this question because before the decree became final, Congress enacted the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988, thereby providing an alternative basis for the attorneys' fees award.

A. The District Court erred in finding the Transit Authority guilty of unlawful discrimination under Title VII in the absence of proof of discriminatory intent.

The District Court ruled that the Transit Authority's policy of excluding methadone maintained persons from employment had a disparate impact on Blacks and Hispanics and therefore constituted unlawful employment discrimination under Title VII. The Court conceded the policy was "not adopted with a purpose of racial discrimination." (414 F. Supp. at p. 279)

This Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which established the principle that proof of a racially disproportionate impact is sufficient to establish a violation of Title VII, was decided in 1971, at which time Title VII covered only private employment.

The original enactment of Title VII in 1964, which prohibited discrimination because of race, color, religion, sex and national origin in private employment was based on the Commerce Clause, Article 1, Section 8 of the Constitution. (1964 U.S. Code Cong. & Ad. News [88th Congress, Second Session] 2401, 2402, 2475)

In 1972, Title VII was amended to extend its coverage to state and local government employment. (Pub. L. 92-261, Mar. 24, 1972, 86 Stat. 103) The 1972 amendment was based on the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453, and fn. 9 (1976). Coverage of state and local government employment could not be based on the Commerce Clause. See *National League of Cities v. Usery*, 426 U.S. 833 (1976), in which this Court declared that Congress had exceeded its powers under the Commerce Clause in enacting a statute which sought to regulate employment decisions of state and local governments. The decision pro-

hibited such regulation not only as to the States themselves but as to "such subordinate arms of a state government" as provide "integral governmental services." 426 U.S. at p. 855, fn. 20.

Since Title VII jurisdiction over state and local government employers is based on the Fourteenth Amendment, in evaluating Title VII complaints against such employers, it is necessary to look to the Fourteenth Amendment standard for adjudicating discrimination claims.

Washington v. Davis, 426 U.S. 229 (1977), made clear that in discrimination claims arising under the Fourteenth Amendment, proof of purposeful discrimination is required. The Court stated:

"We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.

The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. . . . But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." 426 U.S. at p. 239.

A statute cannot be construed more broadly than its constitutional base. To the extent that Title VII asserts jurisdiction over the employment practices of government employers, it must be construed in accordance with the constitutional test enunciated in *Washington v. Davis*, i.e., there must be proof of discriminatory purpose. See *Blake v. City of Los Angeles*, 435 F. Supp. 55 (DCD Cal. 1977); *Scott v. City of Anniston*, 430 F. Supp. 508 (N.D. Ala. 1977); *Friend v. Leidinger*, 446 F. Supp. 361, 386 (E.D. Va. Richmond Division 1977).

Since the Transit Authority's employment policy was not adopted with a racially discriminatory purpose, the finding of unlawful discrimination was improper.

B. The evidence in this case was insufficient to prove a disparate impact in violation of Title VII.

Even if a violation of Title VII could be established against a government agency employer solely on the basis of disparate impact, the evidence in this case was totally inadequate to support the finding of discrimination.

In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) this Court stated that Title VII required:

"... the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." 401 U.S. at p. 431.

In order to establish a prima facie case of disparate impact, the plaintiff must show that a facially neutral employment standard has a disproportionate impact on an affected group. While statistics are a recognized means of establishing a prima facie case of disparate impact, this Court has made clear in *International Brotherhood of Teamsters v. United States, et al.*, 431 U.S. 324, 340 (1977) that:

"... [S]tatistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all the surrounding facts and circumstances. See e.g. *Hester v. Southern R. Co.*, 497 F. 2d 1374, 1379-1381 (CA5)."

See also, concurring opinion of Justice REHNQUIST, in *Dothard v. Rawlinson*, 433 U.S. 321, 338 (1977).

The effectiveness of the statistics used by a plaintiff will depend on the size of the statistical sample (*International Brotherhood of Teamsters v. United States, et al.*, supra, 431 U.S. at pp. 339-340 fn. 20; *Robinson v. City of Dallas*, 514 F. 2d 1271, 1273 [5th Cir. 1975]; *Morita v. Southern California Permanente Medical Group*, 541 F. 2d 217, 220 [9th Cir. 1976], cert. den., 429 U.S. 1050 [1977]); the relevancy of the statistics (*Taylor v. Safeway Stores, Inc.*, 527 F. 2d 263, 272 [10th Cir. 1975]; *Kirkland v. State Department of Correctional Services*, 520 F. 2d 420, 428 [2d Cir. 1975]); and the applicable labor market (*Hazelwood School District, et al. v. United States*, 433 U.S. 299, 308, fn. 13 [1977]).

In the instant case, the District Court conceded that the employment policy in question was "not adopted with a purpose of racial discrimination," (414 F. Supp. at 279) and based its decision entirely on two sets of statistics.

The first set of statistics was that "of the TA employees referred to the TA's medical consultant for suspected violation of its drug policy since July 1972, 81% were Black and Hispanic and only 19% were white." (414 F. Supp. at p. 278) This information was derived from a letter to respondents' counsel from Dr. Harold L. Trigg, Chief of the Methadone Maintenance and Drug Addiction Services at Beth Israel Medical Center, who also serves as medical consultant to the Transit Authority.*

The Trigg letter stated that for the period from July 19, 1972 through October 1, 1974, the racial and ethnic breakdown of individuals referred to him by the Transit Au-

* The Trigg letter was stipulated into the record (See R. Tr. 10/22/74, p. 176) and appears in the Circuit Court Appendix at p. 587.

thority was as follows: 39 Blacks, 5 Hispanics and 10 whites.

It was stipulated by the parties during the trial that:

"TA employees showing physical manifestations of drug abuse *other than the definite presence of morphine or methadone or other illicit drug in the urine*, are referred for consultation to Dr. Harold Trigg of Beth Israel Medical Center, who reports his impression to the TA whether the individual is abusing or has abused drugs. The TA accepts Dr. Trigg's impression of the case." (A. p. 86A, emphasis supplied)

Since the people referred to Dr. Trigg by the Transit Authority specifically did not include those whose urine showed the presence of methadone, no methadone maintenance patients would have been included in the group from which the District Court derived its 81% minority figure. Moreover, there is no evidence as to what diagnosis Dr. Trigg made with respect to any of the individuals in the group, nor is there any evidence as to how many, if any, of these individuals were discharged from employment. Thus, this set of statistics is totally irrelevant to the question of whether the Transit Authority's exclusion of methadone maintained persons from employment had a disparate impact on employment opportunities for Blacks and Hispanics.

Furthermore, the entire group involved in this set of statistics consisted of fifty-four people who were referred to Dr. Trigg over a twenty-six month period. The size of the sample is so small as to be meaningless in light of the Transit Authority's total work force of over 40,000 employees. *International Brotherhood of Teamsters v. United States, et al.*, 431 U.S. 324, fn. 20 (1977).

The second set of statistics relied on by the District Court was that "Between 62% and 65% of methadone maintained persons in New York City are Black and Hispanic, meaning that there are almost twice as many Blacks and Hispanics as there are whites in this category." (414 F. Supp. at p. 279) This set of statistics is derived from a letter to respondents' counsel from Peter L. Vogelson, Coordinator of Field Service for the Methadone Information Center of Rockefeller University. (Pl. Ex. 21, R. Tr. 10/22/74, pp. 176-177, Circuit Court Appendix p. 588)

The Vogelson letter stated that the racial/ethnic breakdown of the methadone patient population for Metropolitan New York City was as follows: Black, 38.5% White, 33.14%, Puerto Rican, 22.5%, and Undefined, 5.85%. Thus, the percentage of Blacks was slightly higher than the percentage of Whites, and the percentages of Whites was substantially higher than the percentage of Puerto Ricans.

The Vogelson letter stated that the cited percentages were based on a random sample of 1400 patients and reflected the "total population" of methadone maintenance patients in Metropolitan New York City. However, the Rockefeller University Methadone Information Center does not receive information from the private methadone clinics and consequently, does not have information on the approximately 14,000 patients treated at the various private clinics. (R. Tr. 1/7/75, Dole, 113-116; 1/9/75, Lukoff, 251-252, 399 F. Supp. at p. 1040) Therefore these statistics did not reflect information on more than one-third of the total methadone patient population in New York City.

Moreover, the Vogelson statistics did not consider the employability of the sample. As shown in the Statement of Facts, *supra*, at pp. 18-21, no more than 30-50% of methadone patients are employable.

In order to establish a prima facie case with statistical data, the statistics must be closely related to the specific issues involved in the case. *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 272 (10th Cir. 1975); *Kirkland v. State Department of Correctional Services*, 520 F.2d 420, 428 (2d Cir. 1975). Obviously, the employability of the sample is an essential element of the statistics used to make the prima facie case. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Hazelwood School District v. United States*, 433 U.S. 299 (1977); *International Brotherhood of Teamsters v. United States, et al.*, 431 U.S. 324, fn. 20 (1977).

The Vogelsson statistics, in addition to being based on an incomplete sampling, contained no racial or ethnic information with regard to employable methadone patients. Consequently, these statistics, like the Trigg statistics, *supra*, have no bearing on whether the Transit Authority's employment policy had a disparate impact on the employment opportunities for Blacks and Hispanics, and are totally inadequate to establish a prima facie case.

Despite the glaring defects of the two sets of statistics discussed above, the District Court placed its total reliance on those statistics, and expressly refused to consider what it conceded to be a "liberal amount" of employment of minorities by the Transit Authority. (414 F. Supp. at p. 279)

The Transit Authority's EEO-4 form for 1974* shows that 46% of the Authority's work force is Black and Hispanic, and that these minority groups are employed

* In late 1973, pursuant to the regulations of the Equal Employment Opportunity Commission (29 C.F.R. § 1602.30), the Transit Authority began, for the first time, to maintain records of the racial and ethnic identity of its employees. The Authority has never maintained records of the racial and the ethnic identity of individual applicants for employment. Such records are not required by the EEOC and are prohibited by State law (New York Executive Law § 296.1(d)).

throughout the Authority in all job categories, including officials and administrators, professionals, technicians, clericals, skilled crafts and service and maintenance employees. (Def. Ex. P, R. Tr. 2/12/75, p. 1476, appearing in the Circuit Court Appendix at pp. 2985-2997) These statistics are particularly impressive when placed against the background of statistics from the United States Department of Commerce, Bureau of the Census, which indicate that the civilian work force for the New York Standard Metropolitan Statistical Area for 1970 was approximately 15.0% Black and 5.1% Hispanic. (A., p. 104A)

Yet, the District Court refused to consider either the Transit Authority's work force statistics or any of the evidence dealing with the obvious job-relatedness of the Authority's refusal to employ methadone patients. The Court thus fell prey to the blind reliance on statistics against which this Court cautioned in *International Brotherhood of Teamsters v. United States, et al.*, 431 U.S. 324, 340 (1977).

Since the respondents failed to prove disparate impact, it was not incumbent on the Transit Authority to show that its policy was a business necessity. Nevertheless, the Authority was able to demonstrate business necessity. A determination of whether the employment policy in question is a business necessity includes consideration of the alternative practices available to the employer. "In examining alternatives, the risk and cost to the employer are relevant." *United States v. State of South Carolina*, 445 F. Supp. 1094, 1115 (D.C. D. So. Car. 1977), *aff'd* — U.S. —, 98 S. Ct. 756 (1978).

The only alternative available to the Transit Authority would be individualized consideration of each methadone patient who applies for employment. This approach would require the Authority either to place a heavy reliance on the recommendations of the employees of the methadone clinics or to hire a panel of medical consultants to evaluate methadone applicants. In addition, after hiring the methadone patient, the Authority would have to maintain an ongoing surveillance of the employee, including frequent urinalysis to detect drug abuse. An additional problem in this process of individualized evaluation is the federal regulation declaring records of methadone clinics to be confidential, thereby imposing on the employer the burden of employing methadone patients on the basis of conclusory statements by clinic personnel without specific supportive data.

The obvious job-relatedness of the Transit Authority's policy, particularly in the context of a large and sprawling transit system, together with the substantial economic and administrative burden of attempting to evaluate the employability of individual methadone patients, and of maintaining continuing medical monitoring of methadone patients after employment, demonstrated the requisite business necessity.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgments of the Courts below should be reversed and the complaint should be dismissed.

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OCTOBER TERM, 1978

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NEW YORK CITY TRANSIT AUTHORITY, *et al.*,

Petitioners,

—v.—

CARL BEAZER, *et al.*,

Respondents.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1427

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,

Petitioners,

—v.—

CARL BEAZER, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

Expressed in the terms and circumstances of the case, certiorari has been granted to review the following two questions:

1. Whether the New York City Transit Authority's policy of excluding from employment in any of its non-

safety-sensitive positions all present or past patients in methadone maintenance treatment programs violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment, where both courts below, applying the traditional, least intrusive standard of review to an extensive trial record, found that the Authority's policy bears "no rational relationship" to any of its legitimate needs?

2. Whether the Transit Authority's policy violates Title VII of the Civil Rights Act of 1964 in that it has a grossly disparate adverse impact on blacks and Hispanics and is not justified by business necessity?

Additionally, as argued at pp. 65-71, *infra*, respondents contend that an appropriate threshold question is whether the writ of certiorari should be dismissed in light of recent Congressional action which makes clear that the Transit Authority's policy is unlawful under the Rehabilitation Act of 1973.

STATEMENT

In its statement of the case the Transit Authority attempts to shape this litigation into a new form bearing little, if any, relation to its history below. Making no reference to the massive record in plaintiffs' favor compiled in the district court, or to the fact that it left the district court's findings unchallenged in the court of appeals (Pet. 2a),^{1/} the Transit Authority attempts to resurrect and retry here factual controversies that have already been conclusively laid to rest. Moreover,

^{1/} The forms of citation used in this brief are as follows:

A. ____A refers to pages of the appendix in this Court.

CA ____a refers to pages of the court of appeals appendix.

Tr. ____/____/____, p. ____ refers to pages of the dated transcripts of trial.

Dep. p. ____ refers to pages of transcripts of depositions.

Pl. Ex. ____ refers to plaintiffs' trial exhibits.

Pet. ____a refers to opinions and orders of the courts below as reproduced in the appendix to the petition for certiorari.

Pet. Br. refers to petitioners' brief.

Where cited material in the original record is reproduced in the court of appeals appendix, there is a parallel citation to that appendix.

through inaccuracy, omission and careful selectivity, the Authority has fundamentally distorted the factual context within which this case has been adjudicated and has attempted to create serious misimpressions regarding the scope of the relief which has been granted. Respondents are compelled, therefore, to restate the case completely.

INTRODUCTION

This action—brought pursuant to 42 U.S.C. §1983, the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.—challenged the legality of the New York City Transit Authority's policy of denying employment to any person who had ever been treated in a methadone maintenance program.^{2/} The policy was absolute, applying to every one of the Transit Authority's 47,000 jobs—from janitors, file clerks and secretaries to painters, plumbers, and

^{2/} The action was brought by four named plaintiffs. Two of the plaintiffs had been dismissed by the Transit Authority and two had been rejected as job applicants because of their participation in methadone maintenance programs. A class, as described in the district court opinion (Pet. 16a), was certified under Fed.R.Civ.P. 23(b)(2).

mechanics. While some of these jobs were admittedly safety sensitive, most were no more so than the common occupations in our society. Under the policy any job applicant or current employee who was found to have a history of methadone maintenance treatment was automatically rejected or fired with no consideration of individual qualifications, demonstrated work performance, or years of service at the Transit Authority or elsewhere.

The United States District Court for the Southern District of New York, in a decision later upheld by the United States Court of Appeals for the Second Circuit, held that the application of the Transit Authority's methadone policy to all positions was not "rationally related to . . . safety . . . or any other needs of the TA" (Pet. 19a), and thereby violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The court explicitly left to the Transit Authority discretion to exclude methadone maintenance patients entirely from all safety-sensitive jobs. As to non-sensitive jobs, the court left to the Transit Authority discretion to require that methadone maintenance patients have been successfully enrolled in treatment for at least a year, and to take into account any relevant factors in their personal backgrounds or treatment histories. Pet. 66-67a.

PROCEEDINGS AND DECISIONS BELOW

A. District Court Proceedings

The district court conducted a thoroughgoing factual inquiry into the following issues: (1) the scope of the Transit Authority's employment policy respecting methadone patients and the process by which the Transit Authority had formulated that policy; (2) the nature of Transit Authority employment and the needs of the Authority regarding the performance of its employees and the safety of its operations; and (3) the nature of methadone maintenance treatment and the performance abilities of methadone patients. After extensive discovery and stipulations of fact regarding Transit Authority employment and the formulation of the Authority's methadone policy, the court set the case down for a trial which eventually consumed some three weeks.

Plaintiffs made a lengthy presentation on the nature of methadone maintenance treatment and the characteristics of methadone patients through testimony from many of the leading authorities on the subject. First was the director of the President's Special Action Office for Drug Abuse Prevention and the National Institute on Drug Abuse, the coordinating agencies in the field of drug abuse treatment and research for the

federal government, which for a decade has undertaken a vast commitment of resources and support to methadone maintenance as the primary treatment modality for heroin addiction. Tr. 10/22/74, pp. 3-69, 107, 116; CA 513-81a, Pl. Ex. 30. He was followed by clinicians with direct experience treating methadone patients, and by independent researchers with specialized knowledge about methadone patients' medical condition, functional abilities, social rehabilitation, and vocational experiences.^{3/}

Plaintiffs also presented testimony from major employers who had had direct experience with the work performance of methadone maintenance patients in a wide variety of jobs, including highly skilled and safety-sensitive positions.^{4/}

The Transit Authority called witnesses to describe the nature of Transit Authority employment, and one expert, a pharmacologist of limited knowledge and experience whose testimony the court found "too speculative to be of much value". Pet. 20a; Pet. 33a.

^{3/} Tr. 10/24/74, pp. 300-10, 312-27, CA 681-711a, 712-35a, Pl. Ex. 35-37; Tr. 10/25/74, pp. 362-91, 417-50, CA 762-823a, Pl. Ex. 40.

^{4/} Tr. 10/24/74, pp. 332-53, CA 736-61a, Pl. Ex. 38; Tr. 10/25/74, pp. 568-73, CA 1145-55a, Pl. Ex. 39; Tr. 10/29/74, pp. 575-87, 589-619, 636-65, CA 1156-1241a, Pl. Ex. 42-44.

Then, at the court's request, the court and counsel made a comprehensive eight hour inspection of the Transit Authority's various facilities--organized and conducted by the Authority--to obtain a first hand view of the performance and risks involved in different job positions. Tr. 10/30/74, pp. 769-71, CA 1336-38a; Tr. 11/27/74, p. 3, Ct. Ex. A, CA 292-303a.

Although both parties indicated after the inspection that they had concluded their proof, the court expressed concern that the evidence so disproportionately favored plaintiffs that perhaps it had not received a balanced and complete factual picture. This concern led--at the court's insistence--to nine additional trial days and an "exhaustive effort" to determine "whether all sides of the problems involved in the case had been thoroughly explored." Pet. 20-21a. Through twenty-two additional witnesses ^{5/} the court probed in further detail the process by which the Transit Authority's policy had been formulated, the nature of the Transit Authority's operations and the specific duties of its various employees, the opinions of medical authorities of varying points

^{5/} Six of these witnesses were court witnesses (CA 317a,1608-09a), selected primarily because they had authored articles arguably critical of methadone treatment cited by the Transit Authority at trial.

of view, and the operational and clinical experiences of New York City's major methadone treatment programs.

B. District Court Decisions

On August 6, 1975, the district court issued an opinion containing fifty-one pages of fact findings. Pet. 13-64a. Relying on what it found to be overwhelming evidence, the court concluded that the Transit Authority's absolute methadone policy was utterly without rational justification:

Plaintiffs have more than sustained their burden of proving that there are substantial numbers of persons on methadone maintenance who are as fit for employment as other comparable persons.

No one can have the slightest doubt about the heavy responsibilities of the TA to the public, including their duty respecting the safety of millions of persons who are carried on its subways and buses. However, in my view, the blanket exclusionary policy against persons on methadone maintenance is not rationally related to the safety needs, or any other needs, of the TA.

....
...[T]he crucial point made so strongly by plaintiffs' witnesses was never convincingly challenged--that methadone as administered in the maintenance programs can successfully erase the physical effects of heroin addiction and permit a former heroin addict to function normally both mentally and physically. It is further proved beyond any real dispute that among the 40,000

persons in New York City on methadone maintenance (as in any comparable group of 40,000 New Yorkers), there are substantial numbers who are free of anti-social behavior and free of the abuse of alcohol or illicit drugs; that such persons are capable of employment and many are indeed employed. It is further clear that the employable can be identified by a prospective employer by essentially the same type of procedures used to identify other persons who would make good and reliable employees

This proof applies with equal, if not greater, force to those former heroin addicts who have successfully completed participation in a methadone program.

Pet. 19-22a.

Accordingly, the court held that the Transit Authority's policy violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. However, the court explicitly left the Authority with unfettered discretion to continue a total exclusion of methadone maintenance patients from safety-sensitive positions, as well as a wide degree of latitude in determining whether to employ methadone maintenance patients in non-sensitive positions:

I wish to stress certain things not compelled by my holding. The TA is not required to hire any present or past methadone maintained person where there is a legitimate reason to question the person's ability or competence—including a legitimate reason to believe that the person is abusing illicit drugs or alcohol The TA is not prevented from making reasonable rules and regulations about methadone maintained persons—such

as requiring satisfactory performance in a program for a period of time such as a year, or forbidding methadone maintained persons employment in sensitive categories such as that of subway motorman, subway conductor, subway towerman, bus driver, and jobs dealing with high voltage equipment . . .

Pet. 67a (emphasis in original).

On January 24, 1977 the court entered a permanent injunction and judgment incorporating this limited constitutional decision. The judgment also directed payment to plaintiffs of counsel fees pursuant to the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. §1988, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. Pet. 75-80a.^{6/}

C. Court of Appeals Decision

On June 22, 1977 the court of appeals unanimously affirmed the district court's constitutional ruling. Pet. 1-8a. The court characterized the district court's opinion as "comprehensive and carefully limited". Pet. 2a. It noted that the district court had adopted a "rational

^{6/} Prior to Congressional enactment of the 1976 Act, solely for the purpose of determining the plaintiffs' right to a fee award, the district court had found the Transit Authority's policy violative of Title VII in light of its disproportionate racial impact. Pet. 71a.

relationship" standard of constitutional review and had correctly applied that standard to factual findings which the Transit Authority had not even challenged. The factual findings, the court of appeals found, were "overwhelmingly" supported by the record. Pet. 2a.

Given the Civil Rights Attorney's Fees Award Act of 1976 as a basis for plaintiffs' fee award, the court of appeals expressly refused to reach the issue of the Authority's liability under Title VII. Pet. 3a.

FACT FINDINGS AND RECORD BELOW

The decisions of the district court and the court of appeals are rooted in clear, detailed findings of fact compelled by a massive record. Contrary to the impression the Transit Authority's brief attempts to create, there is virtually no conflicting evidence regarding the central facts at issue.

A. The Transit Authority's Absolute Methadone Policy

The claims of the Transit Authority (Pet. Br. 5) regarding the scope of the very policy about which this case revolves provide a glaring example of its attempt to create factual controversies where there are none.

From the outset, this action has challenged the Transit Authority's flat, across-the-board employment policy barring current, as well as former, methadone patients from all Transit Authority positions. A.24A et seq. The all encompassing nature of this policy has never seriously been disputed. Indeed, the evidence is overwhelming that the Transit Authority's methadone policy is but part of an even more sweeping rule under which the Transit Authority will not employ any person with any history of narcotic usage.

In its answer to plaintiffs' amended complaint the Transit Authority unequivocally admitted that "the Transit Authority do[es] not employ persons who use or have a history of using narcotic drugs, including methadone." A.60A (emphasis added). Much the same language was used by the Authority during discovery when asked by interrogatory to give a detailed description of its employment policy respecting drug-free former heroin addicts: "It is the present policy of the Authority, as it was of its predecessors, not to employ or retain in its employment any person who is presently using heroin or other narcotic drug or has a history of such usage." Pl. Ex. 1, no. 31, p. 3-4, Tr. 10/22/74, p. 147 (emphasis added). The accuracy of the interrogatory answer was unambiguously confirmed during depositions of the current and former chief executive officers of the Authority

(Yunich Dep. p. 5-6, CA 2672-73a; Ronan Dep. p. 8, CA 2657a),^{7/} the Authority's executive officer for labor relations and personnel (McLaren Dep. 1/31/74, pp. 43-44, CA 2477-78a), and the Authority's medical director (Lanzetta Dep. pp. 41-43, CA 2415-17a).^{8/}

In the face of these clear consistent admissions, the Transit Authority in its brief in this Court (Pet. Br. 5) has nonetheless insisted on placing in contest the overall nature of its methadone policy—claiming that while it will not employ current methadone patients, it will individually consider for employment former methadone patients and other persons with a prior addiction history who have been drug-free for at least five years. This contention is entirely inconsistent with the Transit

^{7/} Eight months before the lawsuit was filed the former chief executive officer of the Transit Authority had similarly stated the Transit Authority's policy in a letter to the chairman of the New York State Temporary Commission to Evaluate the Drug Laws:

It is the present policy of the Transit Authority not to employ or to retain those individuals who are participants in a narcotic rehabilitation program. We do not distinguish between those who have completed any rehabilitation or are now on a program. Pl. Ex. 6, Tr. 10/22/74, p. 157 (emphasis added).

^{8/} All portions of depositions cited in this brief were received in evidence at trial. See Tr. 2/12/75, p. 1470.

Authority's litigation posture below.^{9/} It is, moreover, without support in the record.

The only hint in the record of some moderation in the Transit Authority's policy came three months after the trial of this case began, when the Transit Authority's executive officer for labor relations and personnel claimed (during his third trial appearance) that the Authority had very recently decided to "give individual consideration" to job applicants who had been drug-free for "from five to ten years." Tr. 1/28/75, p. 709, CA 1106a. It is this, and only this, testimony that the Transit Authority cites (Pet. Br. 5) to indicate that it has an individual policy respecting the employment of drug-free persons. Upon cross examination, however, it became clear that the Transit Authority had not in fact made a policy change. It had only decided that it might consider whether to make a change in the future:

Let me clarify one thing. When I say we are reviewing the cases [of individual drug-free applicants], I didn't really mean that. It is reviewing the procedure. We are trying to find at what point we would exercise—settle on a policy in this area.

^{9/} E.g., Transit Authority Court of Appeals Brief 4 (question presented was whether the Transit Authority was constitutionally required to employ "persons who are or in the past had been maintained on methadone").

Id., at p. 725, CA 1122a. The very limited nature of this shift in the Transit Authority's litigation posture was noted by the district court.^{10/} And the record does not contain one scintilla of evidence that, except in the context of this litigation, the Transit Authority has ever knowingly employed anyone with a prior addiction history—despite the fact that it hires 3000 persons annually.^{11/} Pet. 55a.

B. The Transit Authority's Failure to Assess the Need for Its Methadone Policy

Contrary to the claims of the Transit Authority (Pet. Br. 6-7), it has never made a bona fide assessment of the relationship of its methadone policy to its legitimate needs. The Transit Authority's complete

^{10/} "The TA has indicated that there might be some flexibility with respect to a person who had once used methadone, but had been free of such use for a period of five years or more. But even on this point, there is no official directive indicating that the person would be considered for employment." Pet. 18a.

^{11/} In any case, even the Transit Authority's own belated suggestion of a shift in policy toward drug-free persons, however lacking in credibility, leaves uncontested the fact that it excluded all persons with a history of narcotic usage well into the time of trial.

failure to make such an assessment was abundantly clear to the district court, and it permeated both the record and the history of the district court proceedings.

Through discovery it was established relatively early in the case that the Transit Authority's methadone policy came into being without even an affirmative decision being made to adopt it. As the Transit Authority's medical director testified, the Authority had an old rule against narcotic use by its employees, and when methadone maintenance treatment was developed it was automatically included within the scope of the rule's prohibition without any consideration being given to the difference between it and other narcotic use:

Q. Would you describe to me generally the process by which the policy of not hiring and not retaining in your employ ex-addicts was formulated . . . ?

A. I couldn't tell you because it was there, I mean the thing is, you bring up a subject that I think no one was aware of drug addicts until lately, I think maybe when I became medical director, and it was one of the standards you know, that drug addicts or barbiturates or any dependent drugs, you would be disqualified.

....

Q. Was there a policy on Methadone when you became medical director?

A. Again, you bring up the word Methadone, it is a narcotic and as long as narcotics disqualify, it wouldn't have to be named Methadone, it is a narcotic.

Lanzetta Dep., pp. 63-64, CA 2432-33a.

Once the methadone policy came into being responsible officials at the Transit Authority made no attempts to appraise the need for it--their attention was directed solely to enforcement measures. William Ronan, who served as chief executive officer of the Transit Authority during almost all of the pre-trial history of the case,^{12/} testified to this effect with great specificity:

Q. Was the drug policy . . . ever reviewed by you as part of any internal review . . . ?

A. In terms of an overall review of personnel policy, we accepted the existing personnel policies which seemed to be satisfactory, and there was no major overhaul of the personnel policy during the time that I was there.

Q. I believe that you stated earlier that at those times that you did consider whether the policy should be continued, you consulted with persons from among your cadre of Executive Officers.

A. Actually, it was not a question of whether we thought the policy should or should not be continued. That was never discussed. It was the question of implementation of the existing policy.

^{12/} Ronan was chairman of the Transit Authority from March, 1968 until May, 1974. A. 75-76A. The trial of the case began five months after he left office. It is during his tenure that the Transit Authority alleges (Pet. Br. 5-7) that it conducted an assessment of the need for its methadone policy.

I would not want to give you the impression that there has been a discussion as to any recommended change in the policy. I recall no such discussion of anyone or anyone suggesting to me as the Chairman and Chief Executive Officer, either from the Board level or the Executive level--I recall no one having raised the question that we should change the policy. Discussions were in terms of the implementation of the policy, as I recall.

Ronan Dep., pp. 6-7, CA 2655-56a. This failure to act persisted despite the condemnation of the Transit Authority's policy by an official state investigatory commission^{13/} and the Authority's own Impartial Disciplinary Review Board.^{14/}

^{13/} The New York State Temporary Commission to Evaluate the Drug Laws condemned the Transit Authority's methadone policy and characterized plaintiff Beazer's dismissal from the Transit Authority as "[t]he most revealing example of the manner in which prejudice against addicts can overwhelm all other relevant considerations. . . ." Temporary State Commission to Evaluate the Drug Laws, Employing the Rehabilitated Addict, New York State Legislative Document No. 10 28-30 (1973).

^{14/} The Impartial Disciplinary Review Board is a joint labor-management body that may review and make recommendations regarding Transit Authority disciplinary decisions even though it has no legal power to alter them. A.108A. In reviewing plaintiff Beazer's dismissal
(continued next page)

Since it was apparent at an early point that the Transit Authority had not previously considered its methadone policy, the court offered it the opportunity to do so in the course of the litigation. Thus, a few months after the action was filed the New York City Civil Service Commission--at that time a party defendant--proposed to join with the Transit Authority in a cooperative study of the the feasibility of employing methadone maintenance patients in Transit Authority jobs. CA 73-75a. The court urged the Transit Authority to accept this proposal, and, since it appeared to do so, the court informally stayed proceedings. At an early stage, however, it became clear that, whatever the results of the study, the Transit Authority had no intention of revising its methadone policy. The study was subsequently abandoned. Tr. 1/13/77, p. 139, CA 54-64a. As

its opinion and recommendation stated, in part:

The Board feels that it is incumbent upon the Union and the Authority to reconsider the rules and practices of the Transit System as it relates to drug users. They should particularly examine the merits of the relatively new methadone program. Perhaps, through their careful consideration of the drug problem as it relates to the employees of the Authority, they will find a way to help employees, such as Carl Beazer, who have struggled so valiantly and well to overcome the drug habit.

Tr. 10/22/74, p. 155, Pl. Ex. 5, CA 2693a.

the court later observed, the Transit Authority's sole interest in the study had been to use it as a possible means of validating its existing exclusionary policy:

... [T]here was a lot of evasion and it finally turned out there wasn't any objective study. All they were doing was ... simply trying to persuade the [City] personnel department that there was enough backing for their preconceived notion and that's all.

They had no intention of reevaluating anything and that was admitted finally after a lot of questioning.

Tr. 1/13/77, p. 139; see also Tr. 12/12/74, p. 115, CA 1034a. No serious assessment, was ever conducted by the Transit Authority. Immediately prior to trial it stipulated that it had "never studied the requirements of ... TA jobs ... to determine the ... ability of ... persons participating in methadone maintenance programs to perform the various jobs." A. 79A.

The complete and continued unwillingness of the Transit Authority to evaluate its own policy deeply concerned the district judge. After hearing the first day of trial testimony and examining the extensive discovery evidence and pre-trial stipulations submitted by the parties he expressed his concern at length:

THE COURT: ... [T]he Transit Authority has a practice but not a policy [N]obody remembers how it was exactly developed and it has been used but not scrutinized. I don't find any

evidence that the Transit Authority has really made an intelligent evaluation of whether or not the methadone people can or cannot work on the various jobs.

....

...[T]here is nothing I have seen that indicates that the Transit Authority has really attempted to find out the reasons pro and con, and so I am here as a federal court starting from scratch, taking up a case to see whether there is a rational ground for the Transit Authority practice where the Transit Authority itself has not made any attempt to do that. You can do it better than I can if you do it. You are the employer.

MR. SUMMERS: What might be "desirable," your Honor, is a different matter than what is constitutionally required, you know.

....

[THE COURT:] I think that the Transit Authority, for its own sake, should have examined this problem ... and come up with some cogent policy that really is a policy and a policy means something thought out, not just stumbled into.

Tr. 10/22/74, pp. 184-87.

Throughout the trial the district judge asked for evidence describing what, if any, policy making process the Transit Authority had engaged in. He received in response vague, self-serving testimony from Wilbur McLaren, Transit Authority executive officer for labor relations and personnel. This testimony, the sole support offered by the Transit Authority for its present claim (Pet. Br. 6-7) that its methadone policy resulted from a reasoned review, was filled with obvious misconceptions

regarding methadone.^{15/} Much of it was offpoint, relating purely to enforcement of the Transit Authority's policy against employing drug abusers.^{16/} Indeed, to the extent that the testimony dealt with relevant subjects, it was contradicted by other evidence, including the witness' own statements.^{17/} A month after hearing the

^{15/} Given the evidence already before the district court, McLaren's misconceptions were apparent and would have been so to anyone who had given any objective consideration to the subject. See pp. 36-44, infra.

^{16/} The Transit Authority has misleadingly cited (Pet. Br. 6) to a portion of this offpoint testimony (Tr. 10/25/74, pp. 501, 502, 508, 510, 534) as the basis for the proposition that the Transit Authority initiated "seminars and conferences" regarding persons with drug histories and discussed with "some of the leading experts in the field" the possibility of employing methadone patients. Pet. Br. 6. When read in context (see, e.g., district court's comments at p. 506) the testimony at pp. 501 and 502 of the transcript actually describes the Transit Authority's search for better methods and professional help in detecting drug abusers so they could be discharged from its workforce. The testimony at pp. 510 and 534, though more misleading (see n. 17 infra), relates to the same topic. And the testimony on p. 508 refers to the abortive Transit Authority-Civil Service Commission study described on pp. 20-21, supra.

^{17/} For example, during some of the testimony cited by the Transit Authority (Tr. 10/25/74, pp. 510, 534, 535-44)
(continued next page)

testimony, the judge, while asking for more evidence on what the Transit Authority had done to formulate its policy, evaluated what was already before him:

I think the answer is already in the record.
You really haven't done much of anything.

Tr. 11/27/74, p. 26, CA 312a.

McLaren vaguely described a process by which he allegedly sought out a number of persons knowledgeable about methadone maintenance treatment and received from them information to the effect that methadone patients are unemployable. On cross examination, however, he admitted that the only established authorities on methadone maintenance whom he could definitely recall having talked with were Drs. Gollance, Dole and Trigg. Tr. 10/25/74, 562-63. In later testimony McLaren described how he had actually contacted Dole solely for the purpose of finding means of more accurately identifying active addicts so the Transit Authority's existing drug policy could be better enforced, and he expressly denied having discussed with Dr. Dole the employability of methadone patients. Tr. 12/12/74, p. 179. ("Q: Do you recall no conversation in which you discussed with him possible employment of methadone maintained persons? A: No, I do not." Moreover, to the extent that Dole, Gollance and Trigg had advised McLaren — whether gratuitously or otherwise — regarding the Transit Authority's methadone policy, it was to tell him that methadone maintenance patients were suitable for Transit Authority employment. See Transit Authority stipulations at A. 80-81A; Tr. 1/7/75, pp. 64-65, CA 1545-46a; Tr. 1/9/75, p. 154, CA 1633a. Gollance and Dole had even offered to help the Transit Authority in the process of selecting methadone patients
(continued next page)

Viewed in context, the Transit Authority's present claims regarding the process by which it formulated its policy evaporate. In large part the district court determined to what extent the Transit Authority's policy was rational because of the Transit Authority's past and continued refusal to look to rational factors on its own.

C. The Nature of Transit Authority Employment

The district court made detailed findings regarding the nature of Transit Authority employment. Pet. 54-62a.^{18/} Those findings, virtually unchallenged here (see

for jobs. Tr. 1/7/75, pp. 65-67, CA 1546-48a; Tr. 1/9/75, p. 163, CA 1642a.

McLaren also mischaracterized his relationship with Dr. Trigg, indicating that Trigg was his regular consultant on the employability of methadone patients. Tr. 10/25/74, 544-46. Trigg denied any such role, stating categorically that he had been retained by the Transit Authority solely for the limited purpose of determining whether Transit Authority employees facing discharge due to alleged drug abuse were in fact drug abusers. E.g., Trigg Dep. 3/21/74, pp. 48-51, CA 2619-27a.

^{18/} These findings were based on many stipulations made on the subject (A. 87-102A), the extensive testimony of Transit Authority officials (e.g., Tr. 1/31/75, pp. 777-947, CA 1998-2069a; Tr. 2/12/75, pp. 1256-1356, 1419-59), an on-site tour of Transit Authority operations (see
(continued next page)

Pet. Br. 4-5), clearly establish that most Transit Authority jobs are neither unique nor safety-sensitive. Furthermore, "it is perfectly clear that large numbers of the employees in the TA perform work essentially similar to the type of work done in other businesses and industries where methadone maintained persons appear to be successfully employed." Pet. 55a.

1. Job positions and employment structure

The Transit Authority's 47,000 employees hold about 400 different job titles, the majority of which are non-operating positions involving common tasks. Pet. 56a. Among the non-operating positions are, for example:

	number
account clerks	25
accountants	54
bookkeeping machine operators	49
car cleaners	950
caretakers	229
carpenters	167
cashiers	32
clerks	664

p. 8, supra; Tr. 11/27/74, pp. 1-5, CA 287-303a) and masses of documentary material (e.g., Tr. 2/12/75, p. 1467, Pl. Ex. 60; CA 333-61a.

collecting agents	145
keypunch operators	57
masons	198
messengers	12
painters	679
plumbers	207
porters (janitors)	1162
stenographers	92
stock assistants	103
stockmen	72
token sellers	4145
turnstile maintainers	141
typists	223
watchmen	162

Pet. 56a; Tr. 2/12/75, p. 1467, Pl. Ex. 60.

About 3400 Transit Authority employees work in so-called "city-wide" civil service job titles and, by the Transit Authority's own stipulation, perform tasks that are essentially the same as those performed by persons employed throughout New York City agencies (where discrimination against methadone maintenance participants is expressly prohibited).^{19/} Pet. 53a; A84A. In job

^{19/} The "city-wide" job titles include those positions most commonly found in municipal government, such as clerks and secretaries. Employment standards for such titles are established uniformly for all agencies — including the Transit Authority — which are under the jurisdiction of the New York City Civil Service Commission. Under the Commission's medical standards and official policy directives present and former methadone patients are entitled to be considered individ-
(continued next page)

titles peculiar to the Transit Authority large numbers of employees also do obviously non-sensitive, and often menial, work. For example, the Transit Authority's 950 "car cleaners" do no more than sweep, wash and otherwise clean up subway cars. Pet. 58-59a. Another 5600 persons work in the Transit Authority's subway stations, cleaning, selling tokens and repairing turnstiles. Pet. 62a. And about 3000 persons are employed in the Transit Authority's various shops where, under supervision, they perform maintenance tasks like painting and body work on subway cars. Pet. 60a.

The Transit Authority has built into its employment system a variety of mechanisms to ensure against inadequate job performance. Before Transit Authority employees are hired they must go through a thorough background investigation, medical examination and civil service test (Tr. 2/12/75, pp. 1284-85, 1287-92, 1356). After being hired and as a condition of any promotion

usually for employment in city-wide titles in use in the Transit Authority. However, as the district court described, the Transit Authority has evaded these provisions through use of the "one in three rule" contained in the New York Civil Service Law which allows the Transit Authority to pass over job candidates who have been certified for appointment by the Civil Service Commission. Pet. 51-53a.

they must complete lengthy probationary terms during which they are subject to especially close supervision. Pet. 57a; Tr. 1/31/75, p. 820-21, CA 2042-43a.

After probation, almost all Transit Authority non-operating employees still work under the direct supervision of a foreman or supervisor. Pet. 57a. Most operating employees are similarly supervised; those that are not directly supervised must report in each morning to a foreman who determines their fitness for duty and who is trained to detect alcohol and drug abuse problems. Tr. 2/12/75, pp. 1262-66, 1280; Tr. 1/31/75, pp. 808-13, CA 2030-35a.

The system is also carefully structured to ensure that the more responsibility a job entails the more checks there are against poor performance. For example, entry-level positions are generally low-level unskilled jobs, and higher level jobs can be obtained only after years of satisfactory on-the-job performance. Transit Authority workers often must begin employment as "helpers" or "trainees" and perform under close individual supervision for a year or more before they are even eligible for promotion to more responsible levels. Pet. 62a.

Finally, the Transit Authority's disciplinary structure provides for immediate action against unfit employees. The Transit Authority can, and does, immedi-

ately suspend from active service employees who report unfit for duty, including employees under the influence of alcohol or drugs. Crannan Dep., p. 1264.

2. Employment of disabled persons

The non-sensitivity of most Transit Authority jobs is confirmed by its employment policies respecting alcoholics, diabetics, epileptics and cardiac patients who concededly could create risks if employed in safety-sensitive positions.

The Transit Authority stipulated below that, in contrast to its policy excluding former addicts presently or in the past maintained on methadone, it does not maintain a blanket rule barring the employment of alcoholics. Instead, it considers the "hiring of such persons on an individual basis in light of factors such as their rehabilitation and the safety sensitivity of the job to which they seek appointment." A.96A. Moreover, the Transit Authority does not dismiss active alcoholics discovered in its employ. Although drinking on the job or reporting unfit for duty by reason of drinking is a violation of Transit Authority rules, employees with three years of service are virtually never dismissed for a first offense. Pet. 63a; A.98A. If a first offender works in a critical position he is transferred to less sensitive duties; if he works in a non-critical area he is suspended

from work for a maximum of three days. Pet. 63a.^{20/}
About 50-60 percent of the Authority's job positions are classified as non-critical for purposes of its alcoholism policy. E.g., McLaren Dep. 1/31/74, p. 136, CA 2518a. These positions include a wide variety of jobs such as office work; maintaining subway track, tunnels and structures; and cleaning and repairing subway cars. Pet. 64a.^{21/}

^{20/} For a detailed description of the Transit Authority's alcoholism policy see testimony of Joseph Warren, director of the Transit Authority's alcoholism program, Warren Dep., CA 2538a et seq. It should be noted that the Transit Authority's statement that it refuses to consider applicants with alcoholism problems (Pet. Br. 26) refers only to current alcoholism problems.

^{21/} The Transit Authority also makes available an in-house counseling program to its employees with drinking problems. It was stipulated that the success rate of the counseling program "is only approximately 60%, since some participants have relapses into drinking and some employees referred to the program drop out or refuse to participate. Nevertheless, persons who do not succeed in the . . . [p]rogram are allowed to continue in the employ of the Authority as long as their on-the-job performance remains adequate." A. 100A.

The Transit Authority also stipulated that employees in safety sensitive positions whose drinking problems have not been discovered by the Authority may
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The Transit Authority has also stipulated that it gives individual consideration to job applications from diabetics, epileptics and persons with heart disease. A.94-95A. Employees from any of these groups would obviously pose a safety risk if all Transit Authority jobs were sensitive. For example, an endocrinologist and assistant professor of medicine at Columbia University testified that, even when in treatment, diabetics are in a substantially more unstable and dangerous physical condition than normal individuals.^{22/}

participate in the counseling program on a confidential basis. "Such enrollment is not reported to the employees' supervisors, and they are not required to accept a demotion in position. . . . Persons have enrolled in the counseling service on a confidential basis while serving in such highly sensitive positions as motormen, towermen, dispatchers, and trainmasters." A. 100-101A; Pet. 64a.

About 2300-2400 employees currently participate in the Transit Authority's alcoholism counseling program. Pet. 64a.

^{22/} Diabetics are subject to comas, especially under stress, and they generally suffer serious vascular changes leading to a significantly increased incidence of strokes and heart attacks. Tr. 10/25/74, pp. 373-76, CA 776-79a.

D. The Suitability of Methadone Maintenance Patients for Employment at the Transit Authority

"Myths and misconceptions abound" concerning methadone maintenance treatment (Pet. 20a), and here, as below, the Transit Authority clings to them in an attempt to justify its policy. Former addicts in methadone treatment are simply not—as the Transit Authority contends—an undifferentiated mass of incurables incapable of either doing everyday jobs or being selected for them. Indeed, as the district court's findings establish, methadone patients as a group bear no inherent characteristic making them any less suited for employment than anyone else:

. . . [M]ethadone as administered in . . . maintenance programs can successfully erase the physical effects of heroin addiction and permit a former heroin addict to function normally both mentally and physically.

. . . .
. . . [A]mong the 40,000 persons in New York City on methadone maintenance (as in any comparable group of 40,000 New Yorkers), there are substantial numbers who are free of anti-social behavior and free of the abuse of alcohol or illicit drugs . . .

. . . .
. . . [S]uch persons are capable of employment and many are indeed employed . . . [and] the employable can be identified by a prospective employer by essentially the same type of proce-

dures used to identify other persons who would make good and reliable employees.

Pet. 21a.

The court's findings rested on a trial which had afforded "a unique opportunity" to explore objectively the relevant issues in depth. Pet. 20a. Testimony came from an extraordinary gathering of leading drug treatment authorities, including both supporters and critics of methadone maintenance. As described supra pp. 8-9, the district court's demand for evidence was extraordinary. After hearing virtually unchallenged testimony from array of persons be called so that every viewpoint could be heard and every relevant issue explored. In the end it was abundantly clear that, despite the public controversy regarding some other aspects of methadone maintenance treatment, there was no genuine controversy regarding the key facts at issue here.

1. Origins and rationale of methadone maintenance treatment

The origins and overall medical rationale of methadone maintenance treatment were described to the district court primarily by Robert L. DuPont, Jr., M.D., then the senior federal official in the field of drug abuse

treatment and research^{23/} and Vincent P. Dole, M.D., a professor at Rockefeller University and senior physician to Rockefeller University Hospital.^{24/} Dr. Dole was called as a court's witness. See p. 8 n. 5, supra. Order filed 1/2/75, CA 317a.

Fifteen years ago Dr. Dole and Dr. Marie Nyswander, a psychiatrist experienced in the treatment of heroin addicts, initiated an extensive study of heroin metabolism at Rockefeller University Hospital. The study demonstrated that former heroin addicts administered stable doses of methadone on a sustained basis show the alert behavior, activity and interest of normal, non-addicted individuals. As a result of the Dole-Nyswander study, a pilot methadone maintenance treatment program was established at the Beth Israel Medical Center in New York City. E.g., Pet. 25a; Tr. 10/22/74, pp. 9-12, CA 530-33a; Tr. 1/7/75, pp. 5-14, CA 1485-94a.

Eventually thousands of heroin addicts were admitted to methadone maintenance treatment at Beth Israel

^{23/} Dr. DuPont was director of the President's Special Action Office on Drug Abuse Prevention and the National Institute on Drug Abuse. See DuPont curriculum vitae, Tr. 10/22/74, p. 8, Pl. Ex. 30, CA 513-22a, 529a.

^{24/} See Dole curriculum vitae, Tr. 1/7/75, p. 4, Pl. Ex. 48, CA 1480a, 1484a.

and numerous other medical facilities throughout the country. E.g., Pet. 25-26a; Tr. 1/7/75, pp. 16-19, CA 1496-99a; Tr. 10/22/74, pp. 12-13, 56-57, 533-34a, 576-77a. For many years now methadone maintenance has been the predominant form of treatment for heroin addiction in the United States. At the time of trial about 70,000 persons, roughly sixty percent of all former heroin addicts in treatment, were enrolled in methadone maintenance programs. About 40,000 of those resided in the New York City area. E.g., Pet. 26a; Tr. 10/22/74, pp. 56-57, CA 576-77a.

The rationale for methadone maintenance as a treatment for heroin addiction is simple. Heroin is a short-acting drug and must be taken several times a day to prevent narcotic withdrawal symptoms. Heroin addicts also tend to bounce every 3-4 hours from one physical state to another, going from a "euphoria" or "rush" immediately after a drug injection to lethargy and the onset of eventual withdrawal. In contrast to heroin, an adequate oral dose of methadone^{25/} achieves a stable

^{25/} Methadone is dispensed in a non-injectable form (Tr. 2/7/75, pp. 1148-49, 2264-65a) and the administration of the drug is rigidly controlled by government regulation. See p. 50, infra.

concentration in the bloodstream and completely suppresses withdrawal for a 24-36 hour period. Methadone maintenance patients also experience a stable physical state, feeling none of the ups and downs to which heroin addicts are subject. E.g., Pet. 24a. Furthermore, through their ingestion of methadone they develop a "cross tolerance" or "blockade" to the effects of other narcotics, so that the injection of even a large dose of heroin has no physical impact. E.g., Pet. 24a; Tr. 10/22/74, pp. 44, 51-53, CA 564a, 571-73a.

2. Physical abilities of methadone maintenance patients

Although the Transit Authority will concede only that maintenance on methadone can enable former heroin addicts to lead "relatively" normal lives (Pet. Br. 9), the district court found that "[t]he overwhelming weight of the evidence is to the effect that a methadone maintenance patient can perform normally, and that undesirable side effects are lacking." Pet. 33a. At trial, all the negative assumptions which might be advanced regarding methadone's physical effects were shown to be entirely without substance.

The directors of all the major methadone treatment programs in New York, together with Drs. DuPont and Dole, were called by plaintiffs or the court to testify

regarding their direct clinical experiences with thousands of methadone participants. They unanimously affirmed that, after a short adjustment period, persons maintained on methadone exhibit no side effects of consequence and are entirely capable of normal functioning.^{26/}

These clinicians' conclusions were confirmed by evidence received about the extraordinarily systematic studies done during the past decade and a half into every aspect of methadone treatment's physical impact.^{27/} As the court noted, "there has been a remarkably intensive effort to test and observe methadone maintenance

^{26/} See, e.g., Testimony of Paul Cushman, M.D., (director of St. Luke's Hospital Methadone Maintenance Treatment Program), Tr. 10/25/74, pp. 367-70, CA 770-73a; Testimony of Joyce H. Lowinson, M.D. (director of the Methadone Maintenance Treatment Program of the Albert Einstein College of Medicine), Tr. 2/7/75, pp. 1127-29, CA 2243-45a; Testimony of Robert L. DuPont, M.D., Tr. 10/22/74, pp. 24-33, CA 544-53a; Testimony of Vincent P. Dole, M.D., Tr. 1/7/75, p. 33, CA 1513a; Testimony of Bernard H. Bihari, M.D., (director of the New York City Methadone Maintenance Treatment Program), Tr. 2/12/75, pp. 1385-88, CA 2340-43a.

^{27/} Tr. 10/22/74, pp. 25-33, CA 545-53a; Tr. 10/24/74, pp. 305, 314-20, 326-27, CA 684-99a, 706a, 722-28a, 734-35a, Pl. Ex. 35; Tr. 10/25/74, pp. 369-73, CA 772-76a; Tr. 1/9/75, pp. 197-214, 224-30, 237-38, CA 1682-99a, 1709-15a, 1722-23a.

patients and to gather statistics about their performance." Pet. 33a.

Norman B. Gordon, Ph.D., the leading authority on the impact of methadone maintenance on human performance^{28/} described the decade of sensitive laboratory studies through which he and various colleagues have examined every conceivable measure of methadone patients' physical and intellectual functioning. Tr. 10/24/74, pp. 305, CA 684-99a, 706a, Pl. Ex. 35. One series of tests, for example, compared patients who had been maintained on high doses of methadone for a year or longer with college students, professional staff members, and other non-addict groups.^{29/} Among the

^{28/} Dr. Gordon is an experimental psychologist. At the time of his testimony he was chairman and professor of psychology, Department of Psychology, Yeshiva University and guest investigator, Rockefeller University. See Gordon curriculum vitae, Tr. 10/24/74, p. 301, Pl. Ex. 36, CA 681-83a, 702a.

^{29/} Gordon, Warner, and Henderson, "Psychomotor and Intellectual Performance Under Methadone Maintenance," Report to the Committee on Drug Dependence, National Academy of Sciences, National Research Council 5136 (1967); Gordon, "Reaction Times of Methadone-Treated Ex-Addicts," 16 *Psychopharmacologia* 337-344 (1970); Gordon, and Appel, "Performance Effectiveness in Relation to Methadone Maintenance," *Proceedings, Fourth National Conference on Methadone Treatment* (continued next page)

functions tested were intellectual performance, psychomotor performance, learning a new skill, retention of a learned skill, visual reaction time for simple tasks, visual reaction time for complex tasks, and auditory reaction time. In not a single test did the performance of the methadone patients differ significantly from that of the comparison group. On the basis of his studies Dr. Gordon concluded that "maintenance on methadone results in no physical side effects that present barriers to any vocational activities." Tr. 10/24/74, p. 305, Pl. Ex. 35, CA 684a.

Dr. Gordon's findings were confirmed by Richard D. Blomberg, an expert on human performance in safety-related environments. On behalf of the National Highway Traffic Safety Administration, Blomberg had conducted a major scientifically controlled study of methadone patients' ability to perform a complex task, driving, in non-laboratory settings.^{30/} Tr. 10/24/74, p. 314, CA 722a. The study demonstrated that methadone patients' driving records are identical to the general

425-27 (1972). For a listing of Dr. Gordon's other studies see Tr. 10/24/75, pp. 301, 305, CA 683a, 684-85a, 702a, 706a.

^{30/} Blomberg is an industrial and management engineer. See Blomberg curriculum vitae, Tr. 10/24/74, p. 312, Pl. Ex. 37, CA 712-18a, 720a.

population's (Tr. 10/24/74, pp. 316-20, CA 724-28a), a finding with wide-ranging positive implications:

Driving is one of the more complex psycho-motor tasks that a normal human undertakes. It involves many aspects of motor performance, controlling a car . . . perceptual performance, decision-making, risk-taking and so forth. It is my opinion that anyone who can perform adequately in the driving task could perform in virtually any other safety-sensitive task such as operating machine tools, driving trucks and so forth

Tr. 10/24/74, p. 326, CA 734a.

In addition to exploring research on the effect of methadone maintenance on human functioning, the court called Mary Jeanne Kreek, M.D., senior research associate at Rockefeller University, to testify about the medical safety of methadone maintenance and its long-term physiological consequences. Order filed 1/2/75, CA 317a. By virtue of her continuous medical research since 1964 into the side effects of methadone maintenance (Tr. 1/9/75, pp. 225-26, CA 1710-11a), Dr. Kreek is the most knowledgeable physician in the country on the topic.^{31/} Her scrutiny of thousands of methadone maintenance patients, including some in treatment for as long as eleven years, has revealed "no . . . unexpected adverse

^{31/} See Kreek curriculum vitae, Tr. 1/9/75, p. 197, CA 1676-80a. For a sampling of the reports of Dr. Kreek's research see id at pp. 1678-80a.

effects, side effects or any alterations of bodily function." Id., at p. 231, CA 1716a. The only persistent medical complaints that she received from methadone patients related to constipation, increased sweating and decreased libido. She noted that all of these are common complaints in the general population (CA 1687-93a, Id., at p. 202-08, 224-25, 1709-10a), and that none constituted problems affecting the complainants' capacity for "normal functioning in whatever their daily activities would be." ^{32/} CA 1710a.

3. Success of methadone maintenance treatment

In defense of its refusal to employ any methadone patient for any job, the Transit Authority claims that methadone maintenance has "failed to achieve its goal for the majority of patients". Pet. Br. 13. The Transit Authority fails to specify exactly which patients and what goal it is talking about. But what is relevant to this case is that the vast majority of methadone maintenance patients who remain in treatment after an initial

^{32/} In light of Dr. Kreek's testimony, and the overwhelming testimony of clinicians (see n. 26, supra), the Transit Authority's suggestion that methadone programs maintaining their patients on "low" doses do so out of concern for the long term effects of the drug is pointless.

adjustment period cease all substance abuse and obtain and retain employment. It is this population--methadone patients of more than a year--to whom the district court has limited relief. Pet. 77a.

Elimination of Substance Abuse

As the district court found, the uniform experience of methadone programs has been that "... the strong majority of methadone maintained persons are successful, at least after the initial period of adjustment, in keeping themselves free of the use of heroin, other illicit drugs, and problem drinking." Pet. 42a.

Admittedly, in the early stages of methadone maintenance many patients attempt to "challenge" their methadone with heroin to see for themselves whether the methadone blockade effect they have been told about really works. Pet. 40a. Some methadone patients also abuse other drugs or alcohol, the effect of which methadone does not block. Within the first six months of entering a methadone program, however, these problem patients are readily identifiable.^{33/} Most patients who

^{33/} E.g., Tr. 10/25/74, p. 467, CA 847a ("there is ... a hard-core group who are very difficult for the programs to work with, these represent a minority, and ... programs know who they are ..."); Tr. 2/7/75, p. 1089, CA
(continued next page)

continue treatment stop abusing drugs and alcohol. The remainder either drop out or are expelled.^{34/}

2205a ("Those patients who are engaged in . . . [illicit] activity stand out. The good patients kind of fade into the background. . ."); Tr. 2/3/75, p. 1040-42, CA 2159-61a. See also p. 50, *infra* regarding the extensive procedures used by methadone maintenance programs to monitor patients.

^{34/} Dr. Lukoff, a court's witness, explained the significance of the initial treatment process as follows:

There is always a self-cleansing in any rehabilitation program where those [who] are more interested in rehabilitation are the ones that stay with your program. . . . These are the ones you're referring to when you're talking about employment.

Tr. 10/25/74, p. 468, 848a.

The evidence in the record substantiating the district court's finding that most methadone patients who remain in treatment cease all substance abuse was exhaustive, and was recounted at length in the district court's opinion. Pet. 40-42a; 44-45a. Except for referring to a study by Chambers and Taylor and the testimony of one witness, both of which were discredited at trial (Pet. 39a), the Transit Authority generally accepts the district court's finding. It argues primarily only that the district court erred by not relying on the characteristics of addicts who enter methadone treatment for a short period of time to discredit the majority of patients who remain in treatment and succeed. (Pet. Br. 16-18). The legal irrelevance of this argument is explained at pp. 95-96, *infra*.

Employment Among Methadone Patients

Methadone patients who successfully adjust to treatment are as employable as comparable persons without addiction histories. And as the court found, "there is impressive evidence about successful employment among methadone patients." See, e.g., Pet. 42-44a.

Many methadone patients (thirty percent in some methadone programs) are already employed at the time they enter treatment. Others are employed in a matter of weeks. The majority in many methadone programs are employed within a year. Pet. 42-44a.

Most patients are not, as the Transit Authority implies (Pet. Br. 22), working in small "pilot programs." They are working throughout the economy, in ordinary jobs, where their drug treatment histories are neither known nor an issue. This was related to the district court by Seymour Joseph, M.D., deputy commissioner of the New York State Drug Abuse Control Commission and a court's witness:

We have people in methadone treatment programs who are performing any and every type of service in this city and state, ranging from being outstanding members of the professions to laborers, going through the gamut . . . you name it.

....

Most of the people with whom they work do not know they are participating in methadone

treatment programs. They have no awareness of it, just as I am sure . . . there are many people in the agencies that are involved in this suit that too have numerous participants in methadone treatment programs, but they are non-visible

Tr. 1/28/75, pp. 627-29, CA 1918-20a. Dr. Joseph's testimony was confirmed by a number of other witnesses. They and Dr. Joseph listed examples of ordinary employment positions successfully held by methadone maintenance patients ranging from machine workers to truck drivers to attorneys. E.g., Tr. 2/3/75, p. 1051, CA 2170a; Tr. 2/7/75, pp. 1112-13, 1190-91, CA 2228-29a, 2306-07a.

Evidence was also received about methadone patients' successful work experiences under referral relationships that methadone programs have established with many willing employers in the New York City area--including, for example, Chemical Bank, New York Life Insurance, Metropolitan Life Insurance, J. C. Penney, McGraw-Hill, Seagram, Columbia Presbyterian Hospital, Consolidated Edison, New York Telephone and the Off-Track Betting Corporation. Pet. 44a; Tr. 10/25/74, pp. 421-22, CA 795-96a. A number of these employers testified at trial, and, contrary to the Transit Authority's claims here, their testimony was persuasive that methadone patients perform as well as the general population.

An official of the Sheet Metal Workers Union testified that his organization had accepted methadone

maintenance patients into positions involving the use of welding equipment and hazardous machinery, often at great heights with little or no supervision. Their job performance had been "uniformly excellent" and indistinguishable from that of drug-free individuals. Tr. 10/24/74, p. 333, CA 736-40a, 743a, Pl. Ex. 38.

A vice president of the New York City Off-Track Betting Corporation (OTB), testified about the experience that OTB had had with two of its offices staffed entirely by former addicts, about half of whom were maintained on methadone. Tr. 10/29/74, p. 637, CA 1207-09a, 1212a, Pl. Ex. 44. Even though they were specifically selected from a former addict group considered as "hard core unemployable," the performance of their offices was "indistinguishable from other OTB branches." CA 1207a, 1209a. On the basis of this experience, OTB had concluded that "neither former drug history alone . . . nor participation in . . . methadone maintenance treatment was a reason to disqualify a person from work with large amounts of cash in an essentially unsupervised high stress situation." CA 1209a.

The assistant vice president and medical director of the Consolidated Edison Company testified that Con Ed had knowingly hired about 100 former addicts, many of whom were methadone maintenance patients. These employees worked in a wide variety of positions and were eligible for advancement along normal promotional lines.

Con Ed believed its experience with former heroin addicts had been successful, and a controlled study of the work performance of methadone maintained employees indicated that it was as good as or better than average. Pet. 43a; Tr. 10/25/74, p. 568, CA 1145-48a, 1150a, Pl. Ex. 39.

The favorable testimony of these and other employer witnesses was uncontroverted. The Transit Authority did not produce a single witness who had reached negative conclusions about the work performance of methadone patients.

E. Ability of the Transit Authority to Select Particular Methadone Maintenance Patients for Employment

"Intensive inquiry" by the district court established that the Transit Authority and its existing medical staff is capable of selecting methadone maintenance patients for jobs "in basically the same way as . . . other prospective employees." Pet. 46a; Tr. 1/2/75, p. 520, CA 1798a; Tr. 2/3/75, p. 1005, CA 1831a. Indeed, due to the extensive screening information available from treatment programs the Transit Authority can be more assured of the employability of particular methadone maintenance patients than of other job candidates.

The Transit Authority's ordinary employee screening procedures include written, physical, and medical examinations, and probationary performance evaluations.^{35/} For positions involving skilled work or high level responsibility the Transit Authority also demands proof of recent, directly related prior work experience. Tr. 2/12/75, p. 1467, Pl. Ex. 60.

Under the district court's judgment, the Transit Authority has wide discretion to incorporate in its screening procedure any reasonable selection criteria with respect to methadone maintenance patients that it deems appropriate, specifically including a requirement that applicants have had a successful treatment record in a reliable methadone maintenance program for a year or other time period. Pet. 76-77a. The Transit Authority is also free to require the transmittal of detailed information about the applicant from the particular methadone program involved. The evidence is that such information would enable the Transit Authority to know far more about methadone job applicants' reliability and freedom from substance abuse than it does for other persons.

^{35/} Tr. 2/12/75, pp. 1261, 1284-85, 1287-92, 1365, 1442-43, 1454-55; Tr. 1/31/75, pp. 820-22, CA 2042-44a, 2063a.

Under federal and New York law, methadone maintenance patients are required to visit their treatment programs at least six days each week for their first three months in treatment. The frequency of these visits may be reduced gradually over a period of two years but at no time to less than twice per week. CA 3163a, 3146-47a.^{36/} At their program visits patients are closely observed by professional personnel, randomly given urinalyses to check for drug use (at least once weekly under federal and New York law), and engaged in a program of vocational and personal counseling.^{37/} The result is that methadone programs have a wealth of information about their patients' dependability that is potentially available to employers. As the court noted, methadone maintenance patients are "under scrutiny far greater than is usually given almost any other human being in normal walks of life." Tr. 1/13/77, p. 172, CA 503a.

^{36/} The federal regulations reproduced in the court of appeals appendix have been republished at 42 Fed. Reg. 46698 *et seq.* (Sept. 16, 1977) for the purposes of future recodification at 2. C.F.R. 291.505 *et seq.*

^{37/} Tr. 10/22/74, pp. 15-19, CA 535-39a; Tr. 2/7/75, pp. 1082-87, CA 2198-2203a; 2/12/75, pp. 1372-77, CA 2327-32a; Tr. 2/3/75, pp. 927-30, 1016-17, 1047-48, CA 2107-10a, 2140-41a, 2166-67a.

Even some of the most outspoken critics of methadone maintenance treatment admit that the information methadone programs have about their patients far exceeds that which is available when an employer normally selects a job candidate. For example, Irving Lukoff, a court's witness and the person largely responsible for an apparently critical article regarding methadone that had earlier concerned the court, testified:

In every [methadone] program they have much more information than most personnel people have in the ordinary course of their selection of people. They know whether they have been abusing the drugs in the program. They know their criminal histories. They have had contact with them on a weekly, sometimes daily basis for many months, and they have a great deal of information to understand the individual.

Tr. 10/25/74, p. 456, CA 836a. Lukoff's testimony was confirmed by Drs. DuPont^{38/} and Dole^{39/} and by Dr.

^{38/} Q. Can participants in methadone maintenance treatment programs be screened for job reliability with the same degree of certainty that...the non-drug user walking in off the street can be screened for job reliability?

A. The answer is yes, and I think you actually have more--the employer has more knowledge about him as a potential [employee] because of the potential involvement of the treatment agency in making those judgments. So actually he
(continued next page)

Rosenthal, another court's witness and critic of methadone maintenance. Tr. 1/10/75, pp. 420-21.

It is clear, as the district court noted, that those employers who have assessed their experience with methadone patients as employees have not found evaluation of their employability a problem. Pet. 50a. Thomas Doyle, of Con Edison, and Eileen Wolkstein of Beth Israel Methadone Maintenance Treatment Program, described to the court the successful performance of employees screened on the basis of criteria no more complex than nine months' methadone treatment, a recent significant work history, and no overt behavioral or psychiatric problems. Tr. 10/25/74, p. 568, Pl. Ex. 39, CA 1145-48a, 1150a; Tr. 10/25/74, p. 426-33, CA 799-806a. Robert Schluter of the Sheet Metal Workers Union testified that he had selected "excellent" apprentices using only a six month treatment standard and requiring patients to divulge the identities of their drug treatment

has more information on which to base his judgments than he would for somebody who is coming off the street.

Tr. 10/22/74, p. 38, CA 558a.

39/ "You know more about a man coming to a methadone clinic than virtually any other human contact that you will have with another human being." Tr. 1/7/75, p. 95, CA 1576a.

counselors and make available their drug detection urinalysis records. Tr. 10/24/74, p. 333, Pl. Ex. 38, CA 736-40a, 743a. Doyle's and Schluter's testimony was reinforced by Beny Primm, M.D.—executive director of the Addiction and Research Treatment Corporation, which treats the "hardest core" addicts—who testified that any physician would be able to evaluate an individual's addiction and treatment history on the basis of medical records supplied by his methadone program. Tr. 1/27/75, pp. 520-23, CA 1798-1801a.

As for any specific question that an employer such as the Transit Authority might have regarding whether information about patients had been supplied by reputable clinics, Dr. Primm explained that the determination was "not very difficult" and could be easily done by a Transit Authority physician relying on an easily accessible medical grapevine and a list of programs inspected for compliance with strict state and federal regulations. Tr. 1/27/75, pp. 524-26, CA 1802-04a. Dr. Dole agreed that the regulatory agencies could be relied on in this regard. Tr. 1/7/75, pp. 22-24, CA 1502-04a.

In its brief the Transit Authority has ignored the one-sided evidence regarding the ease of methadone patient screening, and has instead proffered the testimony of Drs. Trigg, Dole and Gollance for the proposition that "the expert witnesses agreed" that an employer would need "an unusual amount of advice and help" to

hire a methadone patient. (Pet. Br. 23-24). The testimony of these doctors is referred to totally out of context. For example, Dr. Trigg, as the Transit Authority claims (Pet. Br. 24), did testify regarding his interest in a former addict certification board. But Dr. Trigg also testified that it is easy for a methadone program to identify problem patients, that programs identify them within a year, and that as an employer he would find the recommendations of all public methadone programs reliable. Tr. 1/10/75, pp. 369-61, 402-04. He further testified that screening could be done reliably by a single physician in cooperation with the patient's program (Tr. 2/3/75, p. 857-58), and he specifically corroborated Dr. Primm's testimony that program reliability could be assessed through government information and the medical grapevine. Tr. 2/3/75, p. 858-59. The Transit Authority's citations to Dr. Dole and Dr. Gollance fare no better.^{40/}

^{40/} Dr. Dole's and Dr. Gollance's testimony cited by the Transit Authority about an employer's need for an unusual amount of help from someone experienced in the methadone field was in response to the court's questions about how an employer could evaluate a methadone job applicant who had a very short treatment record. Tr. 1/7/75, pp. 95-97, CA 1576-78a; Tr. 1/9/75, p. 155, CA 1634a. It is this type of applicant that the Transit Authority under the court's judgment has discretion to
(continued next page)

The Transit Authority's claim that methadone programs are prohibited from providing adequate information to employers (Pet. Br. 25-26) is similarly baseless. The governing federal regulations were specifically designed to permit employers to obtain the information needed for rational employment decisions. CA 362-64a; 3185a; Pet. 50-51a.^{41/} And when employers have sought information it has been fully provided on both a pre-employment and follow-up basis. E.g., Pet. 50a.^{42/}

exclude completely. It should be noted that during his testimony Dr. Dole observed that a methadone patient who had received the benefit of treatment for only six months was, nonetheless, more employable than a culturally disadvantaged minority individual from the same neighborhood with no addiction history. Tr. 1/7/75, p. 103, CA 1584a.

^{41/} As the district court recognized, it is clear under 42 C.F.R. §2.38 that a patient may consent to the release of information relevant to employment to an employer or prospective employer. Pet. 50-51a. The restriction that programs not turn over information to employers who will use it to discriminate on the basis of a drug abuse history in no way precludes a program from reporting current abuse. Dr. DuPont's testimony cited by the Transit Authority (Pet. Br. pp. 25-26) concerning somewhat more restrictive confidentiality rules preceded the current regulations.

^{42/} The Transit Authority's claim that "all of the experts questioned at trial" testified that methadone
(continued next page)

Every leg of the district court's finding that the Transit Authority can reliably identify employable methadone patients through its regular screening procedures rests, as the court of appeals found, on overwhelming evidence. Pet. 2a. Indeed, given a fact finding

clinics would give only very limited information to employers (Pet. Br. 25-26) is simply incredible.

Eileen Wolkstein, director of vocational rehabilitation for the Beth Israel Methadone Maintenance program (6,700 patients) explained that her clinics initially inform employers of a patient's history and how long the patient has been free from drug abuse, that they periodically provide reports containing any evidence of renewed drug abuse, and that they inform an employer whenever a patient is terminated from treatment. Tr. 10/25/74, pp. 424-26, 441-42, CA 797-99a, 814-15a. Thomas Doyle, on the receiving end of this information at Con Edison, specifically corroborated that his company had received reports from Beth Israel that contained drug detection urinalysis results and reports of missed medication. Dr. Doyle further stated he had never been denied any treatment information he had requested. Tr. 10/25/74, p. 572-73, CA 1154-55a. Joyce Lowinson, M.D., who runs the Bronx State methadone program, testified that her program also provides employers with a variety of information, specifically including reports of drug abuse. Tr. 2/7/75, p. 1102, CA 2218a.

The Transit Authority's citations to "experts" regarding the limited release of information result from misreadings or attempts at gross distortion.

The Transit Authority cites the testimony of Marybelle Perlman. In fact Ms. Perlman, a former
(continued next page)

process as comprehensive as that undertaken by the district court, this finding, like every other factual determination discussed above, was the only reasonable one that could have been made.

counselor at a methadone program, testified that her program always brings problems such as drug abuse to an employer's attention. Tr. 2/3/75, p. 1050; CA 2169a. On cross-examination she stated that any release of information would be governed by regulations and that she would have to consult a lawyer before testifying further. Tr. 2/3/75, p. 1060-61, CA 2179-80a. This the Transit Authority cites as expert testimony that programs provide only attendance reports and progress evaluations.

The Transit Authority similarly miscites Dr. Joseph. In fact, he stated that methadone maintenance programs would cooperate with employers to the fullest extent consistent with federal law, with which he was not fully versed. Tr. 1/28/75, p. 670, CA 1961a.

The Transit Authority further miscites the testimony of Henry Biggart of the Off-Track Betting Corporation, which received referrals through an intermediary, the Vera Institute. Biggart testified that Vera had supplied information on missed medication or drug abuse. He did state that there had been confidential information that Vera had been unable to obtain, but he concluded that he had never been denied any information he felt necessary to the safe, efficient operation of his business. Tr. 10/29/74, p. 662-64; CA 1238-40a.

SUMMARY OF ARGUMENT

I

Congress has just expressly declared the blanket exclusion, by recipients of federal financial assistance, of former drug abusers from employment to be unlawful. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 §122(a)(6)(C),^{43/} (amending the Rehabilitation Act of 1973 §7(6), 29 U.S.C. §706(6)). The legislative history of the 1978 Amendments makes explicit Congressional intent to protect former heroin addicts in methadone maintenance treatment from the discrimination prohibited by section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. 124 Cong. Rec. S 19002 (Daily Ed. Oct. 14, 1978) (Remarks of Senator Williams). This legislation applies to and clearly prohibits the Transit Authority's exclusionary methadone policy. Inasmuch as review of the policy's constitutionality, or legality under Title VII, would have no bearing on whether the Transit Authority or other employers may continue such practices, it is submitted that the adjudication of this case would not be "a provident expenditure

^{43/} See note 45, infra, and accompanying text.

of the energies of the Court" and thus the writ should be dismissed. Triangle Improvement Council v. Ritchie, 402 U.S. 497, 502 (1971) (Harlan, J., concurring in dismissal of writ).

II

The Transit Authority's blanket denial of employment to fully rehabilitated heroin addicts who are being or ever have been treated in methadone maintenance programs violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Applying the well-established, minimum standard of judicial review under those clauses to an extensive record, the courts below correctly concluded that barring such individuals from ordinary, non-safety-sensitive jobs bears no rational relationship to any legitimate need of the Authority. That conclusion more than adequately supports the limited relief ordered below, which leaves the Transit Authority discretion to exclude methadone patients entirely from all sensitive jobs, to require a year of demonstrated successful treatment prior to consideration for other positions, and to require methadone patients to meet all other ordinary employment criteria.

Both the constitutional ruling and its factual underpinnings rest on an overwhelming record compiled in a

thoroughgoing manner by a district court with the utmost solicitude for the interests of the Transit Authority.

The court acted only after satisfying itself that the Transit Authority's absolute methadone policy was not the result of any deliberate decisionmaking process. On the contrary, the Transit Authority -- whose policy stood in sharp contrast to the employment policies of the New York State Civil Service Commission, the New York City Civil Service Commission, and the federal government, all of which provide for individualized job consideration of former drug abusers, including methadone patients -- had persistently refused to give any objective consideration to whether excluding methadone maintenance patients from its employ served its needs in any way.

Faced with this abdication, the district judge conducted a thorough search for a rational justification for the Transit Authority's policy, a search he carried well beyond the initial presentations of the adversaries to ensure that no basis for the policy went undiscerned. The district court's inquiry resulted in a record that conclusively establishes that methadone maintenance has no adverse effect whatsoever on an individual's behavior or job performance ability, that after a brief initial adjustment period the majority of methadone patients are fully employable, and that the Transit Authority can readily identify the employable methadone patients

through the very procedures it follows in evaluating other prospective employees.

In light of those findings it is clear that methadone maintenance itself implies no risk of poor performance or misconduct. There is simply no connection between the methadone policy and safety, efficiency, or any other conceivably relevant interest of the Transit Authority. The limited relief ordered, which affects only jobs the Transit Authority already deems suitable for alcoholics in treatment, diabetics, epileptics, and cardiac patients, confirms the absence of any impact on the safe operation of the transit system.

The Transit Authority's complete failure to consider whether any justification existed for its policy, and the total absence, as found by both courts below on detailed findings of fact and an extensive record, of any connection between the Transit Authority's policy and its needs distinguishes the instant case from those in which this Court has upheld a legislative classification as rationally related to a legitimate governmental objective. See, e.g., Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); San Antonio Independent School District of Rodriguez, 411 U.S. 1 (1973). The constitutional judgment below reflects an extremely modest example of judicial review warranting this Court's affirmance.

III

The district court held, in the context of a motion for an award of attorney's fees, that the Transit Authority's methadone policy violates Title VII of the Civil Rights Act of 1964 in that it has a disparate adverse impact upon blacks and Hispanics and cannot be justified by business necessity. The substantial overrepresentation of blacks and Hispanics among that part of the population that is addicted to hard drugs or in treatment to overcome that addiction is not a statistical fluke: the high incidence of drug addiction, like the high rates of unemployment and infant mortality, has its origins in centuries of purposeful, debilitating racial discrimination.

The district court based its holding on statistical data that shows a gross disparity between minority representation in methadone maintenance programs (62-65%) and among Transit Authority employees and applicants suspected of violating its drug policy (81%) and minority representation in the population from which the Authority draws its employees (20%). The record amply supports the trial court's finding of disparate impact and the Transit Authority, which offered no countervailing evidence, cannot for the first time in this Court

challenge the completeness, accuracy, statistical significance or relevance of these data. Dothard v. Rawlinson, 433 U.S. 321, 331 (1977).

Moreover, the possibility that the Transit Authority may have achieved racial balance in its work force cannot justify the use of a selection criterion that screens out minorities at a far higher rate than whites. The only justification for such a criterion is business necessity. Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Transit Authority has never even attempted to determine whether methadone maintenance patients can perform the kinds of non-safety-sensitive jobs at issue in this case, and the trial court's holding that the Transit Authority's methadone policy bears no rational relationship to its business or safety needs is clearly supported by the record.

The extension by Congress of Title VII to public employers is supported by both the Commerce Clause and the Enforcement Clause of the Fourteenth Amendment. Unlike the minimum wage law at issue in National League of Cities v. Usery, 426 U.S. 833 (1976), Title VII's prohibition of racial discrimination in employment represents a paramount national interest, in no way interferes with the "integral governmental functions" of states or cities, id. at 851, imposes no costs on complying

jurisdictions, and therefore does not exceed Congress's power under the Commerce Clause.

The application of Title VII's discriminatory effect test to state and local governmental employers was also a proper exercise of Congress' power under section 5 of the Fourteenth Amendment. It has long been recognized that Congress has the power to make findings and to prescribe remedial measures for past discrimination which go beyond the dictates of the Constitution. E.g., South Carolina v. Katzenbach, 383 U.S. 301 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970).

ARGUMENT

I

CONGRESS HAS JUST EXPLICITLY DECLARED THAT PRACTICES LIKE THAT OF THE TRANSIT AUTHORITY ARE UNLAWFUL UNDER THE REHABILITATION ACT OF 1973. THE QUESTION OF THE CONSTITUTIONALITY OF THE POLICY IS OF NO FUTURE PRACTICAL SIGNIFICANCE AND THE WRIT SHOULD BE DISMISSED.

Petitioners and amicus American Public Transit Association attempt to create the impression that this Court's decision will decide whether the New York City Transit Authority, and similar systems across the country, will have to give individualized consideration to the employment of methadone maintenance patients and other former heroin addicts. This Court may decide whether the Constitution or Title VII invalidates the Transit Authority's methadone policy. The Congress of the United States, however, has removed from the judiciary the question of whether that policy violates federal law and answered, quite simply, yes.

Enacted subsequent to the acts of discrimination suffered by the named plaintiffs, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, provides that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap . . . be subjected

to discrimination under any program or activity receiving Federal financial assistance."^{44/} On April 12, 1977, the Attorney General of the United States issued an opinion, based on extensive analysis of the legislative history, that drug addicts are "handicapped individuals" protected by the antidiscrimination provision of section 504. Br. Opp. Cert. A5.

On October 14, 1978, both houses of Congress confirmed that otherwise qualified persons with histories of drug abuse are protected by section 504, by voting to amend section 7(6) of the Rehabilitation Act, 29 U.S.C. §706(b), to provide:

... Subject to the second sentence of this subparagraph, the term 'handicapped individual' means, for purposes of titles IV and V of this Act, any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment. For purposes of sections 503 and 504 as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser

^{44/} According to the most recently published report of the Metropolitan Transportation Authority, for the fiscal year ended June 30, 1976 the New York City Transit Authority received more than \$135 million in federal funds for operating assistance from the Urban Mass Transit Administration. Metropolitan Transportation Authority Annual Report-1976, pp. 51, 53.

whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

Conference Report on H.R. 12467, the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Sec. 122(a)(6)(C), 124 Cong. Rec. H 12675 (Daily Ed. Oct. 12, 1978), adopted by House of Representatives, 124 Cong. Rec. H 13476 (Daily Ed. Oct. 14, 1978), and by Senate, 124 Cong. Rec. S 19002 (Daily Ed. Oct. 14, 1978)^{45/}

^{45/} This bill, which contains extensive amendments to the Rehabilitation Act of 1973, has not, as of this writing, been signed by the President. Whether the package is enacted into law or not, this particular provision remains an expression of Congressional approval of the Attorney General's opinion (Br. Opp. Cert. A 5) that qualified persons with histories of drug addiction are to be considered handicapped persons protected by section 504 of the Rehabilitation Act.

[W]hile the legislative history of the 1973 act, as authoritatively interpreted by the Attorney General, made clear that qualified individuals with conditions or histories of alcoholism or drug addiction were protected from discrimination by covered employers, this amendment codifies that intent.

124 Cong. Rec. S19001 (Daily Ed. October 14, 1978) (Remarks of Senator Williams).

The purpose of the amendment was stated by Senator Williams:

This amendment is designed to make absolutely clear that employers covered by the act must not discriminate against those persons having a history or condition of alcoholism or drug abuse who are qualified for the particular employment they seek.

124 Cong. Rec. S 19001 (Daily Ed. Oct. 14, 1978.)

The fact findings of Congress closely parallel those of the trial court in the instant case:

The experience of treatment professional and major employers alike has demonstrated that many recovered alcoholics and drug abusers perform competently and reliably in the full range of tasks, skilled or unskilled, hazardous or not, that make up the job market.

... From the Federal experience with drug abuse treatment, it is abundantly clear that substantial numbers of former heroin addicts are fully capable of safe, efficient job performance and are readily identifiable. A blanket refusal to hire these individuals cannot be justified.

Id. at S 19001-02. Moreover, Congress addressed itself specifically to the question of discrimination against methadone maintenance patients:

...[A]n employer cannot assume that a history of alcoholism or drug addiction, including a past addiction currently treated by methadone maintenance, poses sufficient danger in and of itself to justify exclusion. Such an assumption would have no basis in fact and the act does not permit it.

Id. at S 19002.

These statutory requirements go far beyond the individualized consideration of certain methadone patients for non-sensitive jobs ordered by the district court. In the light of these developments, review of the Transit Authority's absolute exclusionary policy can have no impact on its present or future legality.

This Court has not hesitated to dismiss the writ where supervening events have deprived the case of the "special and important reasons" for review required by Rule 19. Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 73 (1955). Although the Rehabilitation Act was discussed in Respondents' Brief in Opposition to Certiorari (pp. 26-28), only the subsequent passage of the clarifying amendment made it absolutely clear that the Act applies to practices like those of the Transit Authority. Thus, this is a case where "further study of the law [previously before the Court] discloses that there is no need for an opinion of this Court on the questions presented by the petition." Burrell v. McCray, 426 U.S. 471, 472 (1976) (Stevens, J., concurring in dismissal of the writ).^{46/}

^{46/} See also Cook v. Hudson, 429 U.S. 165, (1976) (writ dismissed where previously raised statute deemed significant when reviewed in light of a subsequent decision of (continued next page)

In view of the diminished significance of the legal issues before the Court, this becomes a particularly appropriate case for dismissal of the writ given the factual nature of the Transit Authority's argument.

In *Newell v. Norton*, 3 Wall. 257, 18 L.Ed. 271, Mr. Justice Grier stated the considerations weighing against Supreme Court review of factual determinations: 'It would be very tedious as well as a very unprofitable task to again examine and compare the conflicting statements of the witnesses in this volume of depositions. And, even if we could make our opinion intelligible, the case could never be a precedent for any other case, or worth the trouble of understanding.' 3 Wall. at page 267.

Dick v. New York Life Insurance Co., 359 U.S. 437, 454 (1959) (Frankfurter, J., dissenting on ground that the writ should have been dismissed as improvidently granted).

Although the particular legal issues raised by this case are not affected by the Rehabilitation Act as recently clarified, the determination of those issues will

this Court); *Triangle Improvement Council v. Ritchie*, 402 U.S. 497, 499-500 (1971) (Harlan, J., concurring in dismissal of the writ) (new statute, modeled after the one before the Court when it granted the writ, altered potential impact of a decision); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 (1955) (writ dismissed once significant legislation, cited to the Court before the grant of the writ, was placed in proper "perspective").

have no bearing on whether the Transit Authority or other employers may continue the practices involved here; therefore, the dispute between the individual litigants is better left to the disposition of the courts below. "This Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants." *Rice*, 349 U.S. at 74; see also, *Triangle Improvement Council*, 402 U.S. at 499 (Harlan, J., concurring in the dismissal of the writ).

Accordingly, inasmuch as "the exercise of [the Court's] power of review would be of no significant continuing national import," respondents respectfully submit that this Court should dismiss the writ of certiorari. *Triangle Improvement Council*, 402 U.S. at 499 (Harlan, J., concurring).

II

THE DECISIONS BELOW THAT THE TRANSIT AUTHORITY'S METHADONE POLICY IS UNCONSTITUTIONAL REST SOUNDLY ON APPLICATION OF THE TRADITIONAL "RATIONAL BASIS" STANDARD TO OVERWHELMING EVIDENCE AND MUST BE AFFIRMED.

The district court stated its conclusion, which the court of appeals affirmed, quite simply:

[T]he blanket exclusionary policy against persons on methadone maintenance is not rationally related to the safety needs, or any other needs, of the TA.

Pet. 19a. Both well established law and thoroughly demonstrated fact required that conclusion.

In the first place, the courts below tested the Transit Authority's policy by the traditional "rational basis" standard of review under the Equal Protection and Due Process clauses of the Fourteenth Amendment, not by any heightened or "strict" scrutiny.^{47/} Moreover, the

^{47/} Because any substantive due process limit on public employment criteria created by the Fourteenth Amendment liberty interest in employment, see note 53, infra, would appear to be no more strict than the limits imposed by the Equal Protection clause, plaintiffs cast the remainder of their argument in equal protection terms for convenience.

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district judge scrupulously avoided substituting his empirical powers and policy judgment for those of the Transit Authority. Rather, prompted only by the past and continued refusal of the Transit Authority to consider whether any justification existed for its policy, the district court conducted the most thorough possible canvassing of evidence regarding methadone maintenance, pro and con, expressly to ensure that no basis for the Transit Authority's policy went undiscovered. That exhaustive search brought forth overwhelming evidence negating any relationship between the methadone policy and each of the full range of justifications that could be conceived in its support. Only then did the court grant plaintiffs limited relief, leaving the Transit Authority

While it is true that no procedural due process claim is before this Court, Pet. Br. 35, plaintiffs note that the administrative hearings provided Beazer and Reyes were confined solely to determining whether they had violated the Transit Authority's rule against narcotic usage. Their participation in methadone maintenance treatment, in the Transit Authority's interpretation, made the conclusion obvious. The hearings were but mechanical applications of the methadone policy and in no way constituted individualized determinations of qualification for employment. Indeed, as the district court pointed out, the hearing board specifically found that Beazer was performing competently while participating in methadone maintenance, but had no choice under the methadone policy other than to approve his termination. Pet. 13a-14a.

broad discretion to set employment standards that will rationally serve its needs.

Clearly, the judgment below constitutes judicial review of a very modest sort and warrants this Court's affirmance.

A. The Courts Below Applied the Rational Basis Standard of Constitutional Review.

The Transit Authority has suggested to this Court, for the first time in the long history of this litigation,^{48/} that the courts below erroneously subjected its methadone policy to the "strict scrutiny" standard of review. Pet. Br. 39-41; Pet. 13. The suggestion requires but brief rebuttal.

Under the Equal Protection Clause of the Fourteenth Amendment, all governmental classifications must meet the "rational basis" standard of judicial review. See Maier v. Roe, 432 U.S. 464, 470 (1977); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312-14 (1976); San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 17 (1973). The "rationality"

^{48/} See Adickes v. S. H. Kress & Co., 398 U.S. 144, 147 n.2 (1970) (the Supreme Court will not ordinarily consider issues neither raised before nor considered by the court of appeals).

test requires the reviewing court to determine whether the classification in issue

rationality furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination.

Rodriguez, 411 U.S. at 17; quoted with approval in Maier v. Roe, 432 U.S. at 470.^{49/}

The plain language of the opinions below makes obvious that the district court and the court of appeals applied this standard and no other. The district court stated the standard of review as follows:

A public entity such as the TA cannot bar persons from employment on the basis of criteria which

^{49/} In light of the clear application of the rational basis standard --not strict scrutiny--by both courts below and the equally clear invalidity of the Transit Authority's policy under that standard, plaintiffs need not enter the debate whether some third, intermediate level of review is also implicit in the Equal Protection clause. See, e.g., Craig v. Boren, 429 U.S. 190, 210-11 (1976) (Powell, J., concurring); id. at 211-12 (Stevens, J., concurring); id. at 220-21 (Rehnquist, J., dissenting); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting). Plaintiffs would only note that commentators have discerned in this Court's most recent applications of the rational basis standard itself a recognition that that test requires meaningful, albeit limited, judicial review. See e.g., G. Gunther Constitutional Law -- 1978 Supplement 216-17. The precise content of the rational basis standard is discussed more fully in part I.B., infra.

have no rational relation to the demands of the jobs to be performed.

Pet. 64a (emphasis added). The court of appeals affirmed the "district court's conclusion of law . . . that the TA's methadone rule has 'no rational relation to the demands of the jobs to be performed.'" Pet. 2a-3a.^{50/}

Nothing in the opinions below suggests that their authors meant anything other than what they said.^{51/} The contention that the district court's careful review of the evidence somehow equates with heightened scrutiny is plainly wrong. Had the district court determined that

^{50/} The district court's conclusion that the methadone policy was not "rationally related to the safety needs, or any other needs, of the TA", Pet. 19a, also reflects recognition of the appropriate standard. Indeed the district judge's statements during the trial proceedings demonstrate his awareness of the appropriate level of review. See, e.g., Tr. 11/27/74, p. 22 ("...there were lots of jobs that really weren't covered by anything that has been told to me so far as to any rational reason why methadone people can't be employed.")

^{51/} The citations in the opinions below to Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Sugarman v. Dougall, 413 U.S. 634 (1973); and Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976), do not reflect strict scrutiny. In the first place, the opinions below must be judged on the basis of the standard they articulate and apply, not by assuming the authors adopted whatever references to heightened scrutiny the cited decisions contain. Second, the district court's discussion of

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strict scrutiny was appropriate, concluding that the methadone policy was invalid would have required no extended analysis. That conclusion would have followed almost reflexively, given the policy's overinclusiveness. The court's exhaustive canvassing and careful review of evidence concerning both methadone maintenance and Transit Authority employment proceeded, not from a determination to apply strict judicial scrutiny, but from the view that it could properly invalidate the Transit Authority's policy only if thoroughly convinced that no rational basis could be found to support it.

The Transit Authority's eleventh hour attempt to rewrite the decisions below is an unpersuasive effort to interject controversy where there was none. All parties urged the courts below to test the Transit Authority's policy by the limited "rational relationship" standard.^{52/} The district court noted that "[t]here is no basic dispute

LaFleur and Dougall focused specifically on references in those decisions to "rationality" review. Pet. 64a-65a. See LaFleur, 414 U.S. at 651-53 and n.2 (Powell, J., concurring); Dougall, 413 U.S. at 647. Similarly, Crawford, relied on by the court of appeals, expressly followed Justice Powell's "rationality" concurrence in LaFleur. 531 F.2d at 1122-23.

^{52/} See Brief of Plaintiffs-Appellees to the Second Circuit at 36-37; Brief of Defendants-Appellees to the Second Circuit at 19.

among the parties as to the constitutional doctrines which apply to the present case." Pet. 64a. The court of appeals recognized the same: "There was no dispute over the governing constitutional doctrines. . . ." Pet. 5a.

In short, there was no controversy over the governing constitutional standard below, and there is in fact none here. The real constitutional question before this Court is whether the district court correctly concluded that the methadone policy bore no rational relationship to any legitimate governmental interest. The painstakingly unintrusive posture assumed by the district judge and the record he compiled, not simply the naked declaration of a standard of review, require that that question be answered in the affirmative.

B. The Courts Below Correctly Concluded That the Transit Authority's Methadone Policy Bore No Rational Relationship to Any Legitimate Governmental Interest.

In Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312 (1976), this Court made clear that classifications on which a public body conditions employment must meet the test of rationality or else fall before the Equal Protection Clause of the Fourteenth Amendment. See also McCarthy v. Philadelphia Civil Service Comm'n, 424 U.S. 645 (1976); Schwabe v. Board of Bar Examiners, 353 U.S. 232 (1957). The classification in

Murgia withstood that test because it "rationally further[ed] the purpose identified by the State. . . ." Id. at 314.

In the case at bar, on the contrary, the district court assembled a comprehensive record on every conceivably relevant interest of the Transit Authority and correctly decided that its methadone policy was rationally related to none. That record compelled the findings of fact on which the court predicated its decision. The constitutional ruling, in turn, followed ineluctably from those findings.^{53/}

^{53/} In urging this Court to affirm the determinations made below under the rational basis standard, plaintiffs by no means intend to denigrate the interests here at stake or to gloss over the unfairness with which the Transit Authority and others have long stigmatized them. This Court has recognized that an individual's interest in employment falls within the concept of liberty guaranteed by the Fourteenth Amendment. See Murgia, 427 U.S. at 323 (Marshall, J., dissenting); Board of Regents v. Roth, 408 U.S. 564, 572 (1972). Employment is of peculiar importance to the plaintiff class. Plaintiffs have never contended, and the courts below in no way ordered, that the Transit Authority must be party to drug abuse rehabilitation or that it must hire anyone other than a fully qualified, reliable individual. Nevertheless, employment is obviously the critical final step in the reintegration of rehabilitated addicts into legitimate society, which the Transit Authority's policy denies even
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1. The district court findings of fact rest on overwhelming evidence compiled through thorough investigation and warrant this Court's acceptance.

The court of appeals concluded that the record assembled during this trial

overwhelmingly supports the trial court's findings that, after a brief initial period of adjustment, many former heroin addicts on methadone maintenance are employable and that identification of those who are employable is readily accomplished through regular personnel procedures.

Pet. 2a. Upon these and subsidiary fact findings, the district court predicated its conclusion that the Transit Authority's methadone policy is not rationally related to any of its legitimate needs.

to those who are demonstrably ready. Because methadone maintenance is a form of medical treatment that may last years or indefinitely, the consequences of the Transit Authority's policy are severe indeed.

Such policies do not arise out of mere happenstance. Society unquestionably casts a stigma on former addicts, and individuals with a history of drug abuse continue to face the widespread discrimination that has long confronted them in the employment sector and elsewhere. As Dr. DuPont testified, persuading employers to judge rehabilitated addicts on the basis of individual merit "is very difficult because of the general prejudice about somebody who has a history of drug use." Tr. 10/22/74, p. 99. See also Temporary State Commission to Evaluate the Drug Laws, *supra* note 13, at 27 ("widespread irrational discrimination on an unyielding and categorical basis.")

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The brief of the Transit Authority consists largely of attempts to impugn these findings by culling shards of purportedly contrary evidence from the substantial record assembled below. This tactical departure need not long detain the Court. As the court of appeals noted, "[o]n appeal the TA [did] not challenge any of Judge Griesa's findings as factually erroneous, nor could it in view of the one-sided record before us." Pet. 2a. This Court should not set aside facts conclusively found by the district court, affirmed by the court of appeals, and unchallenged by the Transit Authority until the present. See e.g., Blau v. Lehman, 368 U.S. 403, 408-09 (1962); United States v. Commercial Credit Co., Inc., 286 U.S. 63, 67 (1932).

In the ordinary case the Transit Authority's attempt to retry factual issues in the Supreme Court

Such long-standing stigmatization bears on the Equal Protection Clause and the underlying "basic concept of our system that legal burdens should bear some relationship to individual responsibility..." Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972), quoted in Craig v. Boren, 429 U.S. 190, 212 n. 2 (1976) (Stevens, J., concurring). In applying this principle to the case at bar, plaintiffs urge that this Court consider that, whatever the genesis of addiction, the judgment below protects only those individuals who have shouldered responsibility and distinguished themselves from any group that might reasonably be thought to share a characteristic that would justify the denial of employment.

would require no extended comment. For, in light of the extensive record as described supra, there can be no serious contention that any of the district court findings of fact are "clearly erroneous." Fed. R. Civ. P. 52(a).
54/

Nevertheless, plaintiffs stress that they do not invoke Rule 52(a) as a cloak for concealing a district court's substitution of its assessment of complicated empirical data or its evaluation of policy priorities for those of the Transit Authority. No such substitution took place. On the contrary, the district judge stepped in only when convinced that the Transit Authority would persist

54/ Indeed, in language befitting the case at bar, this Court has followed the "clearly erroneous" rule with respect to facts of such constitutional consequence as the sectarian or nonsectarian nature of a school:

We cannot say that the foregoing findings as to the role of religion in particular aspects of the colleges are clearly erroneous. Appellants ask us to set those findings aside in certain respects. Not surprisingly, they have gleaned from this record of thousands of pages, compiled during several weeks of trial, occasional evidence of a more sectarian character than the District Court ascribes to the colleges. It is not our place, however, to reappraise the evidence, unless it plainly fails to support the findings of the trier of facts.

Roemer v. Board of Public Works, 426 U.S. 736, 758 (1976) (plurality opinion of Blackmun, J.) (emphasis added).

in its total refusal to consider whether its policy could be justified. Even then he insisted on proceeding beyond the presentation offered by the adversaries, in order to ensure that no rational basis for the methadone policy went undiscovered. When this process is examined, it becomes clear that the findings of fact satisfy a much more demanding standard than the "clearly erroneous" test. As the court of appeals found, they are "overwhelmingly support[ed]" by the evidence. Pet. 2a. Indeed, no reasonable fact finder — judicial, legislative, or administrative — could have concluded otherwise.

The fact finding process here began with the Transit Authority's refusal to evaluate its methadone policy from the time the policy was adopted through the close of the trial. As previously explained in detail,55/ the methadone policy began as a mechanical extension of the Transit Authority's rule against narcotics use. Thereafter the Authority gave thought only to enforcement of the policy, never whether the policy itself was in any way warranted.

The Transit Authority's abdication places this case in wholly different circumstances from those in which this Court has given substance to the presumption that

55/ See pages 16-24, supra.

governmental acts are constitutional.^{56/} The Transit Authority made no rough accommodation of competing interests, acted upon no responsible study. In fact, the policy stands on no accommodation or study at all. The

^{56/} In upholding Texas' property tax system of school financing in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 55 (1973), the Court elaborated on the presumption of constitutionality:

The Texas plan is not the result of hurried, ill-conceived legislation. It certainly is not the product of purposeful discrimination against any group or class. On the contrary, it is rooted in decades of experience in Texas and elsewhere, and in major part is the product of responsible studies by qualified people. In giving substance to the presumption of validity to which the Texas system is entitled, . . . it is important to remember that at every stage of development it has constituted a "rough accommodation" of interests in an effort to arrive at practical and workable solutions. . . .

(citations omitted). The circumstances surrounding the Transit Authority's methadone policy were quite the contrary, as the text above makes clear.

Not only are the factors noted in Rodriguez missing in the specific circumstances of the case at bar, but a more general basis for the presumption is also absent. The presumption of constitutionality may be difficult to overcome with regard to acts of a legislature in part because the formal requirements and political constraints inherent in the legislative process provide some assurance that relevant points of view are aired and considered. That assurance is lacking in the case of administrative bodies or public agencies such as the Transit Authority.

district court had no choice but to step into this vacuum and to determine himself if a rational basis existed for the methadone policy.^{57/}

^{57/} In light of the long-standing discrimination against persons with a history of drug abuse, see note 53, supra, and the unthinking equation of methadone maintenance with heroin addiction, it is not surprising that the Transit Authority has never seriously considered whether that policy is justified:

[A] traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. . . . But that sort of stereotyped reaction may have no rational relationship — other than purely prejudicial discrimination — to the stated purpose for which the classification is being made.

Matthews v. Lucas, 427 U.S. 495, 520-21 (1976) (Stevens, J., dissenting).

Indeed, the Transit Authority's policy stands in sharp contrast to those area agencies most directly concerned with establishing criteria for public employment. The policy of both the New York City Civil Service Commission and the New York State Civil Service Department is to consider applications for employment from persons with an addiction history, including current methadone patients, on their individual merits. A history of drug abuse is not itself a bar to employment, outside of a few safety-sensitive positions. Pet. 51a-52a. See also N.Y. Civ. Serv. Law §50.4(c) (McKinney) (only persons addicted to the unlawful use of narcotics may be excluded from state and local civil service positions). The lack of effect of the City's policy on the Transit Authority is described at note 19, supra. Similarly, federal employment may not be denied on the sole ground of prior drug abuse. 21 U.S.C. §1180. In fact,

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However, the district judge continued to impose a heavy burden of persuasion on plaintiffs on each factual issue. Indeed, he refused to allow the constraints of the adversary structure of civil litigation to mislead him into overlooking a basis for the Transit Authority's policy. As the parties drew their presentations to a close, the judge commented:

What I am really saying is that if this were a case about who owned a diamond ring, then let the litigant -- the adversary process would take over, and if the plaintiffs put on the best proof -- the Court doesn't have to worry about whether enough evidence is brought in. Let the parties put on what they want and leave it at that. But this isn't a case about who owns a diamond ring; this is a case that I fell [sic] -- and I don't want to exaggerate its importance, but I think this is a case of, really, extreme public interest,

Both sides raise questions which are really very important to the public interest.

I want to get my questions answered and I fell [sic] that if the parties themselves do not put on adequate proof, I am going to take steps to get it, and I don't think I have gotten the whole story on

recent federal legislation clearly prohibits recipients of federal financial assistance, which includes the Transit Authority, from maintaining exclusionary policies like the one invalidated below. An argument that this legislation not only confirms the irrationality of the Transit Authority's policy but warrants dismissal of the writ of certiorari is made at part I. supra.

methadone, I don't think I have gotten the whole story on methadone clinics. . . .

Tr. 11/27/74, p. 28-29. s described above,^{58/} nine trial days followed, during which all relevant issues were thoroughly aired through witnesses of varying points of view called by the court as well as the parties.

In sum, the district judge did not substitute his personal judgment for that of the Transit Authority. Acting only when satisfied that no independent judgment had been made by the employer, he laboriously searched the field lest he miss a justification for the methadone policy. This deferential posture is not without relevance to the appropriate measure of review to be given his conclusions of fact. Cf. Hutto v. Finney, 98 S.Ct. 2565, 2572-73 (1978) (district court's exercise of discretion "is entitled to special deference because of the trial judges' . . . recognition of the limits on a federal court's authority"). In these circumstances, the district court must have some latitude to resolve the factual issues that bear on a determination whether any rational connection exists between the wholesale exclusion of methadone patients from the Transit Authority's employ and any of the Transit Authority's legitimate interests.

^{58/} See note 5, supra and accompanying text.

As the court of appeals found, the record "overwhelmingly supports" the district court's crucial factual conclusions -- that substantial numbers of methadone patients are employable and are readily identifiable as such through the Transit Authority's ordinary screening procedure. Pet. 2a. The statement of the "Fact Findings and Record Below", pp. 12-57, supra, exposes in detail the irrelevance and inaccuracy of the Transit Authority's claims regarding the record and fully rehearses the wealth of evidence those claims overlook. That discussion speaks for itself. It suffices here to say that where a federal district judge has shown such conscientious solicitude for the interests of a public employer yet finds after thorough search that the evidence not only permits, but compels certain findings of fact, there can be no basis -- in considerations of comity, separation of powers, or democratic theory -- for rejecting those findings. A contrary rule would serve only as an incentive to policymaking bodies to proceed without thought, confident that isolated remarks or a favorable witness could always be found to vouchsafe whatever decisions the institution had blundered into.

2. The legal conclusions below that the methadone policy violates the Equal Protection test of rationality are correct.

While the rational basis standard is a relatively lenient measure of review, this Court's recent applications of the test, even in upholding legislative classifications, have carefully examined purported connections to government interests to ensure that a rational nexus existed in fact. See, e.g., Ohio Bureau of Unemployment Services v. Hodory, 431 U.S. 471, 489-93 (1977) Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976). Such review is imperative if the standard is to retain any meaning:

Requiring the State to establish only that unequal treatment is in furtherance of a permissible goal, without also requiring the State to show that the means chosen to effectuate that goal are rationally related to its achievement, [would make] equal protection analysis no more than an empty gesture.

San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 68 (1973) (White, J., dissenting).

The district court, as affirmed by the court of appeals, correctly concluded that the Transit Authority's methadone policy could not meet this limited standard. In the first place, the methadone policy reflects anything but "the product of a deliberate and rational choice which [the Transit Authority] had the constitutional power to make." Alexander v. Fioto, 430 U.S. 634, 640

(1977).^{59/} Moreover, the district court eschewed any reassessment of the legitimacy or importance of the interests of the Transit Authority. The court accepted the legitimacy of every proffered interest and tested only for the existence of any connection between each interest and the methadone policy. In every case the court found the connection woefully lacking.

The court began from the two factual premises, see part II.B.1., supra, that after an initial adjustment period a substantial number of persons in methadone maintenance treatment are fully employable and present no greater risk of misconduct or substance abuse than the population at large and that these employable methadone

^{59/} It bears repeating that the Transit Authority's methadone policy stands in strong contrast to the policies of the New York City Civil Service Commission and the New York State Civil Service Department, which provide that neither history of drug abuse nor current methadone maintenance disqualify an individual for employment in all but a few safety sensitive positions. Pet. 51a-52a; see note 57, supra. The aberrational nature of the Transit Authority policy is also revealed by comparison to its own policy of individualized consideration of persons with more familiar medical conditions, such as diabetes, epilepsy, heart disease, or alcoholism. Indeed, the Transit Authority not only retains rehabilitated alcoholics in its employ, it does not automatically discharge persons with current alcoholism conditions. See Pet. 47a, 63a-64a; notes 20-22, supra and accompanying text.

patients are readily identifiable through the Transit Authority's ordinary personnel screening procedures. Four reasons require affirming its conclusion that excluding all those individuals from ordinary jobs bears no rational relationship to any legitimate governmental interest: (1) the mere fact of past or present methadone maintenance has no behavioral or performance consequences of concern to an employer; (2) recognizing employable methadone patients involves negligible administrative costs; (3) the employability of methadone patients rests on long-tested, proven propositions, not on shifting scientific opinion; and (4) employing methadone patients under the decisions below will in no way impinge upon the safety of the transportation systems operated by the Transit Authority.

- a. An individual's past or present methadone maintenance, standing alone, implies no risk of poor performance or misconduct.

As the district court found, individuals in methadone maintenance treatment perform normally in terms of both mental and physical functions and suffer no undesirable side effects. Pet. 33a, 38a. After an initial adjustment period, the strong majority are free from illicit drug abuse and problem drinking. Pet. 42a. Indeed, the findings suggest that the incidence of substance abuse or antisocial behavior among stabilized

methadone patients is no greater than among any comparable segment of the population. Pet. 21a.^{60/}

Given these premises, an employer has absolutely no basis for assuming that the likelihood of reliable, safe performance diminishes due to an individual's present or past participation in methadone maintenance treatment. The case at bar thus distinguishes itself from Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976). The underlying and indisputable presumption validating the mandatory retirement policy in Murgia was that the risk of physical failure increases with age and that the number of people in a given group incapable of performing under stress increases with age. 427 U.S. at 311.

Methadone maintenance presents a different picture. For the individual officers in Murgia who passed the annual physical, one could still assume that performance would eventually decline with age and that even the physical examination would at some point lose

^{60/} The record substantiates the conclusion that the pool of persons who have concluded six months or a year in methadone treatment are as or more employable by any measure than a comparable segment of the population. See, e.g., Tr. 1/7/75, p. 103 (methadone patients after six months treatment more employable than comparison group of disadvantaged minority individuals from same cultural group and neighborhood who had no addiction history) (testimony of Dr. Vincent Dole).

predictive validity. Thus both the annual physicals and the mandatory retirement age were reasonable prophylactic devices, in the context of stress-filled law enforcement duties, to accommodate the undeniable correlation between age and diminished physical capacity.

The successful methadone patient, however, presents no greater risk of poor performance or misconduct than the population at large. A policy excluding him cannot rest on any assumption associating his past addiction or treatment status with a risk relevant to employment; any such assumption, the record here unequivocally demonstrates, would be pure fancy.^{61/} As applied to

^{61/} Congress too has explicitly recognized the baselessness of excluding methadone patients and other former heroin addicts from ordinary employment:

From the Federal experience with drug abuse treatment, it is abundantly clear that substantial numbers of former heroin addicts are fully capable of safe, efficient job performance and are readily identifiable. A blanket refusal to hire these individuals cannot be justified.

124 Cong. Rec. S19002 (Daily Ed. Oct. 14, 1978) (remarks of Sen. Williams). This recognition resulted in legislation that

makes clear that an employer cannot assume that a history of alcoholism or drug addiction, including a past addiction currently treated by methadone maintenance, poses sufficient danger in and

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individuals who have completed a year or more of methadone treatment -- and the judgments below protect only them -- the Transit Authority's policy clearly does have

the effect of excluding from service so few [individuals] who are in fact unqualified as to render [the fact of methadone maintenance treatment] a criterion wholly unrelated to the objective of the [policy].

Murgia, 427 U.S. at 316.^{62/}

b. Identifying employable methadone patients is of negligible administrative cost to the Transit Authority.

It is conceded that a majority of methadone patients must go through an initial adjustment period

of itself to justify exclusion. Such an assumption would have no basis in fact. . . .

Id. (emphasis added.) See also part I., supra, where this legislation is described in detail to explain that it warrants dismissal of the writ of certiorari.

^{62/} In upholding Massachusetts' mandatory retirement policy, this Court expressly noted that the legislature had operated on the principle that retirement should be required at an age at which the efficiency of the "large majority" of employees called for retirement in the public interest. Murgia, 427 U.S. at 316, n. 9.

As the text above makes clear, no comparable principle could possibly be invoked in support of the Transit Authority's methadone policy.

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before they are employable and that a minority may continue to evidence disqualifying behavior after as much as a year in treatment. The district court's findings and substantiating evidence suggest that the size of that minority is not significantly different from the percentage of the general population that might be disqualified for poor performance or misconduct.^{63/} Regardless, the courts below found that the Transit Authority can identify the employable majority through its ordinary selection procedures, or, in other words, with negligible administrative expense. Pet. 21a, 45a; see "Ability of the Transit Authority to Select Particular Methadone Maintenance Patients for Employment," supra, at pp. 48-57.

Given the identifiability of employable methadone patients, the Transit Authority's only conceivable interest in excluding them is saving the administrative costs of identification. Whatever the constitutional relevance of such costs when they do exist, a public employment criterion is surely irrational if a less exclusionary policy would serve the employer's needs equally well with no significant additional cost. See P. Brest, Processes of Constitutional Decisionmaking 1004 n. 9 (1975).

^{63/} See Part II.B.2.a. supra.

This proposition demonstrates the irrelevance of the Transit Authority's complaint that the trial judge focused on evidence of performance, freedom from drug abuse, etc., among methadone patients in treatment six months or more (Pet. Br. 17, 20, 40). Verification of the length of treatment is the most trivial of processes. The district judge, again sensitive to the needs of the Transit Authority, accorded it the discretion to set medical standards requiring a year of treatment as a condition of eligibility for employment. The discretion to set that practically self-executing standard renders any Transit Authority interest in excluding methadone patients in the first months of treatment irrelevant to exclusion of patients who remain beyond that period.

As for the minority of patients who remain in methadone treatment yet continue to present a problem of possible concern to an employer, the findings are again clear that the Transit Authority's ordinary screening procedures suffice to select out these individuals. As explained in detail supra at pp. 49-53, the court recognized that "there are large numbers of methadone maintenance patients who are able to provide to a prospective employer satisfactory objective evidence of employability." Pet. 47a-48a. At most, a reference check with the methadone program is indicated, but as the district court explained, "this is essentially no different from obtaining relevant references for other

types of applicants." Pet. 50a, n. 3.^{64/} Again, excluding employable methadone patients cannot be justified in terms of the costs of identifying them, for those costs are negligible.^{65/}

c. The constitutional rulings below do not rest on unsettled scientific questions.

All the conclusions below regarding the employability of methadone patients rest on unusually settled data. The district judge was adamant that his constitutional ruling not rest in any way on medical opinion that might shift with time:

^{64/} Congress itself has joined in the recognition that substantial numbers of former heroin addicts are "readily identifiable" as fully capable of safe, efficient job performance. 124 Cong. Rec. S19002 (Daily Ed. Oct. 14, 1978) (remarks of Sen. Williams). See also note 61, supra.

^{65/} In this regard the Court should distinguish Murgia. Plaintiffs there attempted to rely on the existence of individual physical examinations which the state performed only as a prophylactic measure to detect deteriorating performance prior to the retirement age. The personnel screening undertaken by the Transit Authority is employed to assess the risks of poor performance or misconduct of all sorts in all applicants and employees; it is not a special measure undertaken for early detection of some risk of addiction by which respondents are attempting to bootstrap an argument that an otherwise justified exclusionary policy is unnecessary.

I don't want to write a Constitutional decision about methadone and have it end up as a thing that is a kind of variable, that someone has a Constitutional right today and five years from now the medical opinion is all different and they don't have the Constitutional right. That is not dealing in a sensible realm of Constitutionality. I want very much to have the whole story on the good and bad points of methadone. . . .

Tr. 11/27/74, p. 30. The judge was able to satisfy this concern. The court's conclusions that methadone maintenance is an efficacious form of treatment that permits normal mental and physical functioning and that many methadone patients are fully and identifiably employable are based on evidence of over a decade of scientific study and practical observation.

Tomorrow may find the discovery of a drug or therapy that cures all addiction and leads to the dismantling of the methadone treatment effort. Such an occurrence would have no effect on the functional, behavioral characteristics of stabilized methadone patients on which the decisions below rest.^{66/}

^{66/} The text above makes clear that the case at bar, unlike Marshall v. United States, 414 U.S. 417, 427 (1974), involves no "medical and scientific uncertainties". In addition, it should be noted that Congress has expressly considered the federal drug abuse treatment experience and concluded that large numbers of methadone patients and other former addicts are fully, identifiably employable and that there is no factual basis for assuming that
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d. The decisions below in no way affect the safety of the Transit Authority's operations.

Plaintiffs wish to stress that the judgment on review in no way impinges on the safety of the transportation system operated by the petitioners. In this regard the case at bar is again distinct from Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 309-10 (1976), which involved solely the stress-filled position of state police officer, a position that this Court has recognized is especially sensitive. See Foley v. Connelie,

methadone maintenance poses any danger that would warrant a blanket employment ban like that of the Transit Authority. See 124 Cong. Rec. S19002 (Daily Ed. Oct. 14, 1978) (remarks of Sen. Williams); see also note 61, *supra*. The legislative history alluded to by the Court in Marshall, see 414 U.S. at 426, which pre-dated the widespread implementation and evaluation of methadone maintenance treatment, has simply not stood the tests of time and proven experience.

Moreover, the decision in Marshall turned on an explicit congressional determination, based on significant evidence, that a three-time felon was a less likely candidate for narcotics rehabilitation than an addict without such a record. See 414 U.S. at 428. Respondents have no quarrel with such a premise and note that the decisions below expressly permit the Transit Authority to consider an applicant's criminal record in determining employability. As Congress itself has now recognized, however, there is simply no analogous premise to impugn the employability of the identifiable majority of methadone patients who are successful in treatment.

98 S.Ct. 1067, 1071-73 (1978).^{67/} Here, by contrast, the Transit Authority has made no challenge to the fact that many of its job titles, including a host of clerical and maintenance positions, are perfectly ordinary positions that do not affect the safety of its system. See pp. 25-28, supra. The Transit Authority's policy, which applies to all but certain "safety-sensitive" titles, of retaining employees with current alcohol problems, who present a far greater risk than the methadone patient demonstrably free of substance abuse, confirms that fact.

Moreover, the district court left the Transit Authority discretion to define safety-sensitive positions from which methadone patients could be excluded. Pet. 67a. In light of the limited dimensions of the judgment, the many Transit Authority jobs unrelated to the system's safety, and the compelling findings that many

^{67/} The Transit Authority's implication (Pet. Br. 4) that this case involves employee selection standards for the Transit Authority police is false. Although the opinions and judgments below do not speak directly to the issue the plaintiffs have never challenged those standards.

Additionally, plaintiffs wish to note that the issue before the Court in Bradley v. Vance, 436 F.Supp. 134 (D.D.C. 1974) (3 judge court), prob. juris. noted, 98 S.Ct. 2230 (1978), has no bearing on the case at bar. The Foreign Service mandatory retirement provision challenged in Bradley, like the police officer measure in
(continued next page)

stabilized individuals in methadone maintenance treatment present no greater risk of poor judgment, slow reactions, or misconduct than the population at large, there can be no argument that the decisions on review affect the safe or efficient operation of the transit system.^{68/}

Murgia, applies only to sensitive jobs involving unusual physical and psychological demands. As in Murgia, the retirement rule rests on the inevitable consequences of aging which affect physical ability and performance under stress. Again, no such adverse assumption can be made regarding the effects of methadone maintenance. See part II.B.2.a. supra. Finally, the special demands of Foreign Service careers have been the subject of repeated congressional examination resulting in consistent legislative determinations that earlier mandatory retirement for Foreign Service officers than other federal civil servants is justified. See, e.g., 65 Cong. Rec. 7564-65 (1924); S. Rep. No. 168, 77th Cong., 1st Sess. 2 (1941); S. Doc. No. 14, 90th Cong., 1st Sess. 112 (1967) (Cabinet Committee study of federal staff retirement systems submitted to Congress as appendix to annual Bureau of the Budget and Civil Service Commission report on federal salaries).

^{68/} It bears repeating that Congress has confirmed that there is no basis in fact for assuming that methadone maintenance or a history of drug addiction poses any danger to the safety of persons or property that would warrant exclusionary employment policies such as that of the Transit Authority. See 124 Cong. Rec. S19001-02 (Daily Ed. Oct. 14, 1978) (remarks of Sen. Williams); see also note 61, supra.

C. Conclusion

The case at bar presents a striking picture of a federal district judge, sensitive to the appropriate limits of his office, who, when confronted with a governmental body's abdication of its responsibility for rational policy-making, engaged in an exhaustive search for a rational connection between policy and legitimate governmental end, and found on compelling evidence that there was none. Plaintiffs urge that if the invalidating of the Transit Authority's methadone policy cannot be sustained, the Equal Protection Clause is indeed an empty guarantee outside of those classes denominated suspect or "quasi-suspect" and those interests deemed fundamental. Neither modern case law nor sound notions of judicial restraint warrants such an emasculation of that clause. The constitutional ruling below should be affirmed.

III

THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE TRANSIT AUTHORITY'S POLICY VIOLATED TITLE VII IN THAT IT HAD A RACIALLY DISCRIMINATORY IMPACT AND WAS UNRELATED TO BUSINESS NECESSITY.

It is respectfully submitted that no question relating to the legality of the Transit Authority's policy under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e et seq.) (hereinafter, "Title VII") is properly before this Court.

The only relief which depended upon the district court's holding that the Transit Authority's methadone policy violated Title VII, in that it had a disparate adverse impact upon blacks and Hispanics and was not job-related, was an award of attorney's fees. Pet. 71a. The need for this jurisdictional base was obviated by the subsequent enactment of the Civil Rights Attorney's Fees Award Act of 1976 (42 U.S.C. §1988), which provided an independent ground for the award of fees. Tr. 1/13/77, p. 177, CA 508a; Pet. 75a-80a. The court of appeals, affirming the award of fees under the 1976 act, saw no need to reach the Title VII issues in the case.

Pet. 3a-4a.^{69/} However, the district court's holding that the Transit Authority's policy violated Title VII was clearly correct.

There can be no doubt that the Transit Authority's drug policy constitutes a form of racial discrimination that goes beyond a mere technical showing of racial impact. The Transit Authority's methadone policy is in fact part of a broader policy banning the employment of all persons with any history of drug abuse. And the unfortunate fact is that drugs have long been intrinsically linked to minority ghetto life. Eighty percent of all active heroin addicts are black or Hispanic. Tr. 10/24/74, p. 460, CA 840a. Two of the named plaintiffs are black and two are Hispanic. Beazer, who grew up in Harlem, started using heroin at age 13:

Drugs was all around me, and in the neighborhood I live at that time was the constant thing. . . . [T]he landlord was using drugs and selling it. The super was using drugs and selling

^{69/} Having upheld the district court's holding of a constitutional violation, the court of appeals quite appropriately pretermitted decision on whether the Transit Authority's policy violated Title VII, since Title VII could have afforded relief only to those members of the certified class who were black or Hispanic.

it. My next door neighbor was using drugs. Everyone was using drugs.

Tr. 10/24/74, p. 205, CA 591a. Reyes grew up in a public housing project in Queens, and also started using heroin, almost as a matter of course, when he was 13 years old:

I grew up—when I grew up it was something that you grow up into . . . [Y]our friends are using drugs, their brothers are using drugs. Your mothers and fathers are. You don't really believe it is that bad, not at that age.

Tr. 10/24/74, pp. 269-70, CA 668-669a. Dr. Dole testified that the prototypical addict is someone who is

black or Puerto Rican, who is brought up in a disadvantaged neighborhood, say East Harlem or the Bronx or Brooklyn or some neighborhood where an enormous exposure to narcotic drugs occurred when he was in adolescence. They were all over the streets and the action was to fool around with drugs. . . . The big man in the neighborhood was the fellow with alligator shoes selling the stuff . . . In some ways, if you are a kid in that cultural group in that neighborhood and you haven't ever tried narcotics, you are out of it. You are a deviant.

Tr. 1/7/75, p. 82, CA 1563a.

The contrast between the Transit Authority's enlightened policy towards alcoholism—a problem with which middle class whites are more familiar and less uncomfortable—and its attitude toward drug addiction—a problem primarily associated with minority ghetto dwellers—demonstrates the inherently racial nature of its

drug policy.^{70/} Indeed, the trial court might well have found that the Transit Authority's knowledge that blacks and Hispanics were in fact bearing the brunt of its drug policy (Lanzetta Dep. p. 80, CA 2445a), was sufficient to support an inference of intentional discrimination.^{71/}

These are among the considerations that have led

^{70/} Of those admitted in 1977 to federally funded drug treatment programs in New York State for heroin abuse, 85.5% were black or Hispanic, and 14.3% were white. National Institute on Drug Abuse, Alcohol, Drug Abuse, and Mental Health Administration, Public Health Service, Department of Health, Education and Welfare, State Statistics, 1977, Statistical Series E, Number 8, Table 3, p. 203 (1978). By contrast, of those admitted to state or federally assisted alcoholism treatment programs in New York State in the year ending March 31, 1977, 24% were black or Hispanic and 57% were white. National Institute on Alcohol Abuse and Alcoholism, Alcohol, Drug Abuse and Mental Health Administration, Public Health Service, Department of Health, Education and Welfare, State Alcoholism Profile Information System, National Status Report Update, Vol. II, Table 26, pp. 86-88 (May 1978).

^{71/} See Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring); United States v. Texas Education Agency, 579 F.2d 910, 913 (5th Cir. 1978); United States v. School District of Omaha, 565 F.2d 127 (8th Cir. 1977) (en banc) cert. denied, 434 U.S. 1065 (1978); NAACP v. Lansing Board of Education, 559 F.2d 1042, 1047-48 (6th Cir. 1977), cert. denied, 434 U.S. 997 (1977).

commentators to conclude that Title VII prohibits discrimination against methadone participants:

[D]iscrimination against ex-addicts is more than merely statistically related to racial discrimination. While courts tend to deal purely in terms of numerical percentages, there is a link between addiction and other problems more readily associated with past racial discrimination. The concentration of heroin users in the poverty-stricken slum areas of major cities provides one indication of this connection. A high rate of addiction may thus be seen as a product of past racial discrimination. . . .

Note, Employment Discrimination Against Rehabilitated Addicts, 49 N.Y.U.L.Rev. 67, 72 (1974).

A. The Facts as Found by the District Court, Unchallenged Below, Are Sufficient to Support a Finding of Disparate Impact of the Transit Authority's Policies on Minorities. ^{72/}

The district court based its conclusion that the Transit Authority's methadone policy has a racially discriminatory effect on blacks and Hispanics on two facts: 1) of the Transit Authority employees referred to the Transit Authority's medical consultant for violations

^{72/} In responding to section II of petitioner's argument respondents are reversing the sequence of issues briefed in order to present the statutory question before the constitutional one.

of its drug policy, 80% were black or Hispanic and 19% were white (Pet. 72a); and 2) between 62% and 65% of methadone maintained persons in New York City are black or Hispanic (Pet. 73a). By comparison, the population from which the Transit Authority draws its employees is only 20.1% black and Hispanic. A. 1041A.

The Transit Authority's challenge to the district court's finding that its methadone policy had a disparate adverse impact upon blacks and Hispanics consists primarily of an attack, articulated for the first time in this Court, upon the completeness, accuracy, statistical significance and relevance of the data upon which the district court relied. Pet. Br. 33-34, 49-52. Nowhere in either the district court or the court of appeals did petitioners raise any of the objections to the trial court's findings that they raise here. This Court's remarks in Dothard v. Rawlinson, 433 U.S. 321, 331 (1977) apply with equal force to this case:

The plaintiffs in a case such as this are not required to exhaust every possible source of evidence, if the evidence actually presented on its face conspicuously demonstrates a job requirement's grossly discriminatory impact. If the employer discerns fallacies or deficiencies in the data offered by plaintiff, he is free to adduce countervailing evidence of his own.

Petitioners offered no evidence at trial even suggesting that minority representation among methadone maintainees was not substantially greater than minority

representation in the general population, in the Transit Authority's work force, or in the Transit Authority's applicant pool.^{73/}

The record contains ample evidence, in addition to that cited by the district court, to support its finding of disparate impact.

^{73/} The reason that there are no data in the record regarding the precise racial breakdown of persons actually dismissed from or rejected for Transit Authority employment due to the methadone policy is that the Transit Authority refused to make discovery on this issue and the court denied plaintiffs' motion to compel such discovery. See Plaintiffs' Interrogatories and Request for Production addressed to Transit Authority defendants (June 22, 1973) Nos. 52-53; Transit Authority Defendants' Answers (October 23, 1973) Nos. 52-53; Plaintiffs' Affidavit in Support of Motion for Sanctions for Failure to Make Discovery, Oct. 18, 1973.

It is clear, however, that the overall population statistics cited above amply support the court's findings of adverse racial impact under Title VII. As demonstrated *infra*, it is precisely such statistics that have been relied upon to establish unlawful racial discrimination in cases directly comparable to the instant action.

Moreover, where, as here, a publicly admitted and announced blanket policy is at issue, statistics relating to the general workforce population and to the population subject to the policy are clearly more relevant than any other statistics, since most methadone patients would simply not have applied for a job from which they knew they would be excluded, no matter how eligible and how anxious for such employment. See Dothard v. Rawlinson, 433 U.S. 321, 330 (1977).

There was expert testimony that blacks and Hispanics constitute 80% of all heroin addicts (Tr. 10/24/74, p. 460, CA 840a), and that participants in New York's methadone programs are predominantly black or Hispanic (Tr. 1/7/75, p. 82, CA 1563a; Tr. 1/27/75, p. 489, CA 1767a).^{74/} Dr. Louis Lanzetta, the Transit Authority's medical director, testified that he interviews all applicants and employees suspected of drug use (Lanzetta Dep., pp. 24, 29, 79, CA 2402a, 2407a, 2444a) and that between seventy-five and eighty percent are black or Hispanic (Lanzetta Dep., p. 80, CA 2445a).

Petitioners complain that the district court did not dispose of the Title VII question in their favor on the basis of the Transit Authority's work force statistics. Pet. Br. 33, 53. The implication that an employment criterion which operates to exclude minorities at a substantially higher rate than whites can be immunized from scrutiny under Title VII by the presence in the work force of a large number of minorities flies in the face of Griggs v. Duke Power Co., 401 U.S. 424 (1971). Griggs

^{74/} In New York State, blacks and Hispanics comprised 85.5% of those admitted to treatment for heroin abuse in federally funded drug treatment programs in 1977. See note 70, supra.

teaches that to escape liability under Title VII an employer must establish the job relatedness of "any given requirement" that has a discriminatory effect. 401 U.S. at 432. This Court recently reaffirmed the holding of Griggs in Furnco Construction Corp. v. Waters, ____ U.S. ____, 98 Sup. Ct. 2943, 2951 (1978):

It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force. (Emphasis in original).

In Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975), this Court spoke to establishing a "prima facie case of discrimination" on the basis of a test's impact on "applicants for hire or promotion." Accord, Dothard v. Rawlinson, 433 U.S. at 329. See also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.14 (1973). Several lower courts have found adverse effect on the basis of a selection criterion's racial impact, even though the employer's work force or new hires included a higher proportion of minority group members than did the local population.^{75/} To hold otherwise would be to permit

^{75/} Green v. Missouri Pacific Railroad Co., 523 F.2d 1290, 1300 (8th Cir. 1975); Davis v. Washington, 512 F.2d ____ (continued next page)

employers to use a wide range of discriminatory non-job-related selection devices, as long as minority representation in their work force equaled minority representation in the labor market. This in effect would create an upper limit quota for minority employment, excluding many from entry level jobs of the type involved in this case, where, because of societal discrimination and disadvantage, one would expect minorities to be over-represented.

In a number of cases courts have relied on a statistical showing of racial impact directly comparable to that made out here to hold that employment policies excluding persons on the basis of criteria such as arrests, convictions, and garnishment were violative of Title VII. See e.g., Green v. Missouri Pacific Railroad Co., 523 F.2d 1290, 1294-95 (8th Cir. 1975)(since blacks were 2 to 6 times more likely than whites to have conviction records, employer's policy of refusing to hire any person with a criminal conviction violative of Title VII); Gregory v. Litton Systems, Inc., 316 F.Supp. 401, 403 (C.D. Cal.

956, 960-61 (D.C. Cir. 1975), reversed on other grounds, 426 U.S. 229 (1976); Johnson v. Goodyear Tire and Rubber Co., 491 F.2d 1364, 1372-73 (5th Cir. 1974); Jones v. New York City Human Resources Administration, 391 F.Supp. 1064, 1068-69 (S.D.N.Y. 1975), aff'd, 528 F.2d 696 (2d Cir. 1976).

1970), aff'd 472 F.2d 631 (9th Cir. 1972)(employer's use of arrest records violative of Title VII since blacks nationally comprise 11% of the population, and account for 27% of reported arrests);^{76/} Wallace v. Debron Corp., 404 F.2d 674 (8th Cir. 1974) and Johnson v. Pike Corp., 332 F.Supp. 490, 494 (C.D. Cal. 1971)(discharge of employees whose wages have been frequently garnished violative of Title VII since proportion of racial minorities among the group of people who have had their wages garnished is significantly higher than the proportion of minorities in the general population).

^{76/} See also Carter v. Gallagher, 3 Empl. Prac. Dec. (CCH) ¶8205 (D. Minn. 1971), aff'd in relevant part, 452 F.2d 315 (8th Cir. 1971), aff'd in relevant part, 452 F.2d 315, 327 (8th Cir. 1972) (en banc), cert. denied, 406 U.S. 950 (1972) ("Comparison of the census data with the arrest data reveals that there is and has been a substantial and significant disparity between the percentage of non-white persons in the city and the percentage of non-white persons arrested . . . Since the percentage of arrests was substantially higher for non-white persons in Minneapolis, the purported arrest record qualification would have had a decided discriminatory effect in discouraging non-white persons from applying for the fire fighter position . . ." 3 Empl. Prac. Dec. (CCH) at 6670).

B. The Transit Authority Made No Showing That Its Methadone Policy was Job-related.

Once it was established that the Transit Authority's methadone policy operates in a disparately adverse manner upon blacks and Hispanics, the burden shifted to the Authority to demonstrate that its policy bears "a manifest relationship to the employment in question." Griggs v. Duke Power Co., 401 U.S. at 432. "Congress has commanded" that any selection criteria used "must measure the person for the job and not the person in the abstract." Id. at 436. Accord, Albemarle Paper Co. v. Moody, 422 U.S. at 425.

The Transit Authority never even attempted to meet this burden. It stipulated that it never studied the requirements of any of its jobs to determine the present ability of methadone maintained persons to perform them. A.79A. Nor did it make any attempt to evaluate the job performance of employees participating in methadone maintenance programs, which employees were later terminated when such participation was discovered. A.80A.

As demonstrated, the Transit Authority's methadone policy fails to satisfy the most lenient equal protection standard—the rational relationship test. Obviously the policy dramatically fails the far stricter business necessity test. The Authority not only failed to

validate its policy—it failed even to think about it.

The district court was clearly correct in finding that the policy has "no rational relation to the demands of the jobs to be performed," that it "goes beyond any rational or legitimate needs of the Transit Authority, and excludes persons just as qualified for employment as many who are hired by the Transit Authority." Pet. 64a, 67a.

C. Extension of Title VII Coverage to Public Employers is a Valid Exercise of Congressional Power Under Both the Commerce Clause and Section 5 of the Fourteenth Amendment.

In the Equal Employment Opportunity Act of 1972, 86 Stat. 103, Congress extended Title VII to agencies of state government, relying upon the authority granted to it by the Commerce Clause, Article I, §8, cl. 3, and Section 5 of the Fourteenth Amendment. See H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 19 (1971); S.Rep. No. 92-415, 92d Cong., 1st Sess. 11 (1971); 118 Cong. Rec. 1816, 1839-40 (1972) (Remarks of Senators Williams and Javits). Petitioners contend that in the light of this Court's decisions in National League of Cities v. Usery, 426 U.S. 833 (1976) and Washington v. Davis, 426 U.S. 229 (1976), neither source of legislative authority can sustain Title VII of the Civil Rights Act of 1964 insofar as that law bars state and local public employers from engaging in

practices which, while adversely affecting minority groups, are not shown to be purposefully discriminatory. Petitioners have overdrawn the scope of National League of Cities and the impact of Washington v. Davis. Both the Commerce Clause and the Fourteenth Amendment support Title VII as amended in 1972.

1. The Commerce Clause authorizes application of Title VII to agencies of state government.

National League of Cities established that Congress does not have the same unfettered control over state and local government activities affecting interstate commerce that it has over private businesses, and that a statute proper as to private industry may be invalidated if it interferes excessively with the "integral governmental functions" of states or cities. 426 U.S. at 851. The constitutionality of such legislation depends upon "the degree of intrusion upon the protected area of state sovereignty" and the extent to which its object is, as a legal or practical matter, an area of substantial federal interest. 426 U.S. at 852-853.^{77/} The federal

^{77/} National League of Cities does not indiscriminately bar all federal legislation enacted pursuant to the
(continued next page)

interest in protecting racial minorities is well established in our constitutional system, and transcends the type of concern at issue in National League of Cities. Conformity with Title VII's effect rule, unlike the minimum wage in National League of Cities, will not increase the payroll costs of complying jurisdictions. Since Title VII prohibits only selection practices which are non-job-related, compliance will not interfere with any legitimate state or local policies.^{78/}

Commerce Clause that would regulate state agencies in their role as employers. The Court specifically declined to overrule Fry v. United States, 421 U.S. 542 (1975) (sustaining Congressional power to apply a wage freeze to employees of state government); Parden v. Terminal Railway Co., 377 U.S. 184 (1964) (sustaining Congressional power to apply the Federal Employers Liability Act to state-owned railroads); California v. Taylor, 353 U.S. 553 (1957) (sustaining Congressional power to apply the Railway Labor Act to state-owned railroads); or United States v. California, 297 U.S. 175 (1936) (sustaining Congressional power to apply the Safety Appliance Act to state-owned railroads).

^{78/} The selection practice held violative of Title VII in this case is also contrary to the law and policies of New York State and New York City. See note 57, supra.

2. The extension to state and local governments of Title VII's prohibition of practices which have a disproportionately adverse impact but which are not the result of a discriminatory purpose is a valid exercise of congressional power under the enforcement clause of the Fourteenth Amendment.

The scope of the powers granted by the Enforcement Clauses of the Civil War Amendments is well illustrated by reference to the cases involving literacy tests for voter registration. In Lassiter v. Northampton County Board of Elections, 360 U.S. 545 (1959), this Court held unanimously that, absent proof of discriminatory purpose or discriminatory administration, North Carolina's literacy test did not violate the Fourteenth or Fifteenth Amendments.

Then the Voting Rights Act of 1965 was passed and Congress suspended all literacy tests in the areas covered by the Act, based upon evidence of discriminatory purpose or discriminatory administration in some areas. Section 4(a) of the Act, 79 Stat. 438. When this provision was challenged, this Court held that an across-the-board suspension, even without prior adjudication of a particular test's invalidity because of discriminatory purpose or discriminatory administration, was appropriate legislation to "enforce" the Fifteenth Amendment. South Carolina v. Katzenbach, 383 U.S. 301, 333-34, 337 (1966).

The ban on literacy tests was extended nationwide by section 201 of the Voting Rights Act Amendments of 1970, 84 Stat. 315, 42 U.S.C. §1973aa. Under this amendment, no state or political subdivision of a state could escape the ban by showing that it had never discriminated in voting, and that it had never used any "test or device" in a discriminatory manner or with a discriminatory purpose. Despite the legality of such literacy tests under the Fourteenth and Fifteenth Amendments in areas, such as Arizona, which had never discriminated or tried to discriminate, this Court unanimously upheld the new right declared by Congress under the Enforcement Clause of these Amendments. Oregon v. Mitchell, 400 U.S. 112, 118 (1970).

The impact of the Enforcement Clause power upon the scope of the Fourteenth and Fifteenth Amendments rights is clear. In an area which the Court had refused to enter because of the limitations on its power to define violations of the Civil War Amendments, the Enforcement Clause gave Congress the power both to define new rights and to provide new means of effectuating old rights, in order to protect the underlying constitutionally declared right to freedom from discriminatory obstacles to voting. Similarly, it is clear that not every new voting procedure in a state which had formerly discriminated in voting would contravene the Fourteenth and Fifteenth

Amendments, but this Court has held that Congress had the power under the Enforcement Clauses to suspend such new procedures and to make them unlawful unless the State carries the burden of showing that the changes will have neither the purpose nor the effect of discrimination in voting. South Carolina v. Katzenbach, 383 U.S. at 334-35.

From the beginning, the Enforcement Clauses of the Civil War Amendments have been held to invest Congress, the branch of government expressly entrusted with their enforcement, with the authority both to create new rights serving the general purposes of the Amendments, and to create new remedies to effectuate those rights. To enforce the prohibition of "involuntary servitude" in the Thirteenth Amendment, Congress had the power to enact the anti-peonage statute, 14 Stat. 546, 18 U.S.C. §1581, which extended the definition of Thirteenth Amendment rights to include compulsory service to secure the payment of a debt, and extended the remedy for their violation by providing criminal sanctions. Clyatt v. United States, 197 U.S. 207, 218 (1905). To enforce the prohibitions of the Fourteenth Amendment, Congress had the power to enact section 4 of the Civil Rights Act of 1875, 18 Stat. 336, 18 U.S.C. §243, which extended the definition of Fourteenth Amendment rights to include the right to freedom from

racial discrimination in service on grand juries and trial juries, and provided the remedy of criminal sanctions, and the remedy of removal, for such violations. Ex parte Virginia, 100 U.S. 339 (1880); Strauder v. West Virginia, 100 U.S. 303 (1880). This Court had not itself defined the scope of Thirteenth and Fourteenth Amendment rights to include such matters at the time Congress enacted these provisions, and it could certainly never have provided the remedies discussed above.

Congress, therefore, clearly has the power under the Enforcement Clause to define rights under the Fourteenth Amendment which go beyond those independently guaranteed by the Amendment; it clearly has the power to alter and shift the burden of proof required to establish a violation of the rights secured by the Amendment; and, it has the power to create new remedies, of a kind different from that which the courts themselves could create for their violation.

The only remaining question is whether the particular Congressional action in question is appropriate under the Fourteenth Amendment. In essence, does the legislation conflict with an express prohibition in the Constitution, is the legislation "adapted to carry out the objects the amendments have in view", and does it tend "to enforce submission to the prohibitions they contain"? Ex parte Virginia, 100 U.S. at 345-46. Accord, McCulloch

v. Maryland, 17 U.S. (4 Wheat.) 315, 421 (1819); South Carolina v. Katzenbach, 383 U.S. at 326; Katzenbach v. Morgan, 384 U.S. 641, 650 (1977); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968). Cf. James Everard's Breweries v. Day, 265 U.S. 545, 559 (1924).

The holding of Washington v. Davis that purposeful discrimination is a required element of a Fourteenth Amendment violation did not purport to create a constitutional right in a state to freedom from all judicial inquiry as to its employment practices in the absence of such a showing. It merely stated a limit to judicial enforcement of the Amendment in the absence of action by the branch of government the Amendment had designated as primarily responsible for its enforcement. Compare Lassiter with South Carolina v. Katzenbach.

On its face, the extension of Title VII to state and local governments is adapted to carry out the objects of the Fourteenth Amendment and to enforce submission to its prohibition against discrimination. In evaluating the propriety of the "inventive manner" in which Congress exercised its authority to end purposeful discrimination in voting by broadly prohibiting practices shown to have had a disparate racial impact in some particular situations, this Court held that such legislative action was permissible where Congress had a sufficient factual basis

for deciding that there was a problem of sufficient scope to warrant its intervention. South Carolina v. Katzenbach, 383 U.S. at 327, 329-31. Accord, Katzenbach v. Morgan, 384 U.S. at 654-56; Oregon v. Mitchell, 400 U.S. at 132-33 (Black, J.). Cf. Regents of the University of California v. Bakke, ___ U.S. ___, 98 Sup. Ct. 2733, 2755 n. 41 (1978) (Opinion of Powell, J.); Id. at 2812-13 (Opinion of Stevens, Stewart and Rehnquist, JJ. and Burger, C.J.). In South Carolina v. Katzenbach, this Court held that "Congress . . . may avail itself of information from any probative source", and held that studies of the U.S. Commission on Civil Rights were such a probative source. 383 U.S. at 330.

The legislative history of the Equal Employment Opportunity Act of 1972 clearly shows a sufficient factual basis for the extension of Title VII to local and State governments. The U.S. Commission on Civil Rights had issued a report in 1969, For All the People...By All the People: A Report on Equal Opportunity in State and Local Government Employment, which found extensive employment discrimination by state and local governments, both of the purposeful type and of the type involving objective, facially neutral requirements adopted in good faith but having a disproportionately adverse

effect on blacks,^{79/} and concluded by recommending the elimination of the exemption of state and local govern-

^{79/} The Commission's findings stated in part:

BARRIERS TO EQUAL OPPORTUNITY

4. State and local government employment opportunities for minorities are restricted by overt discrimination in personnel actions and hiring decisions, a lack of positive action by governments to redress the consequences of past discrimination, and discriminatory and biased treatment on the job.

(a) A merit system of public personnel administration does not eliminate discrimination against members of minorities. It proclaims objectivity, but does not assure it. Discrimination occurs both in recruiting and in selection among final applicants.

(b) Governments have undertaken few efforts to eliminate recruitment and selection devices which are arbitrary, unrelated to job performance, and result in unequal treatment of minorities. Further, governments have failed to undertake programs of positive action to recruit minority applicants and to help them overcome barriers created by current selection procedures.

(c) Promotional opportunities are not made available to minorities on an equal basis by governments that rely on criteria unrelated to job performance and on discriminatory supervisory ratings.

For All the People at 119. Its Conclusion made the same point at 131-32.

ments from the coverage of Title VII. Id. at 128. The Senate Committee Report expressly relied on this report, and cited its references to forms of discrimination not involving discriminatory purpose:

The report's findings indicate that the existence of discrimination is perpetuated by both institutional and overt discriminatory practices, and that past discriminatory practices are maintained through de facto segregated job ladders, invalid selection techniques, and stereotypical misconceptions by supervisors regarding minority group capabilities. The study also indicates that employment discrimination in State and local governments is more pervasive than in the private sector.

S.Rep.No. 92-415, supra, at 10. The House Committee Report was substantially similar. H.Rep.No. 92-238, supra, at 17.

Under the standards established by this Court since the passage of the Civil War Amendments, the extension of Title VII to state and local governments was appropriate legislation under the Enforcement Clause of the Fourteenth Amendment.

CONCLUSION

WHEREFORE, plaintiffs respectfully pray that this Court affirm the judgment of the court of appeals or dismiss the writ of certiorari.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1427

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,

Petitioners,

—v.—

CARL BEAZER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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I.

The Equal Protection Issue.

Respondents have attempted to cast the constitutional issue in terms of the asserted reasonableness of the employment standards imposed on the Transit Authority by the District Court's order. (Respondents' Brief, pp. 1, 100-101)

Of course, the issue in this case is not whether the employment standards imposed by the District Court are reasonable, but whether there is a rational basis for the Transit Authority's exclusion of methadone maintained patients from employment. If, as the Transit Authority con-

tends, that policy has a rational basis, then the District Court was obliged to make a finding of constitutionality and could not impose its own view of reasonable standards on the Authority.

Although respondents attempt to minimize the evidence in the record as to the deficiencies of methadone maintenance as a treatment for heroin addiction, and the problems involved in determining the employability of methadone patients, the fact is that that evidence is a consistent thread running through the testimony of the medical experts who testified at the trial. (Drs. Dole, DuPont, Gollance, Higgins, Joseph, Lowinson, Lukoff, Primm, Redner, Rosenberg, and Trigg.) Despite the fact that most of these experts were proponents of methadone maintenance programs and would be expected to portray the programs in the most favorable light, they were constrained to admit to the uncertainties and limitations of this form of treatment for heroin addiction. The District Court's failure to give adequate consideration to their testimony in this regard was based on the court's misapprehension of the constitutional standard applicable to this case. (Petitioners' Brief, pp. 39-41)

In connection with the problems involved in determining the employability of methadone users, the District Court's misapprehension of the constitutional standard was compounded by the court's failure to consider relevant portions of the federal confidentiality regulation. The court took note only of the section of the federal regulation authorizing methadone clinics to release certain information upon the consent of the patient. (Petition for Certiorari, pp. 50a-51a) The court did not even mention the section of the federal regulation which provides that even where the patient's consent is obtained, the clinic's disclosure to the employer "should be limited to a verification of the patient's

status in treatment or a general evaluation of progress in treatment," and that more specific information may be given only if the employer makes a commitment that such information will not adversely affect the patient's employment. An employer unwilling to make such a commitment would have to rely on meager conclusory statements by clinic personnel and would be unable to obtain specific supportive data. (42 CFR § 2.38(c)(d); Petitioners' Brief, pp. 25-26)

Respondents would have this Court believe that recent experience with methadone programs has obviated the "medical and scientific uncertainties" which concern the Transit Authority and which were recognized by this Court in *Marshall v. U. S.*, 414 U.S. 417, 427. (Respondents' Brief, p. 98, fn. 66) In fact, as shown by the American Public Transit Association in its amicus brief (at pp. 8-12), recent studies show that methadone programs have failed to live up to the expectations of their early proponents, and that the rehabilitation of drug addicts remains an inexact science. (See also, Petitioners' Brief, footnote at pp. 15-16)

Respondents apparently would require the Transit Authority to give the same individualized consideration to methadone users that it gives to diabetics, epileptics and persons with heart ailments. (Respondents' Brief, pp. 30-32) Unlike persons suffering from heart conditions, diabetes, or epilepsy, all of which are specific ailments giving rise to specific physical limitations which may be relevant to one job but not to another, methadone users generate legitimate concern as to stability and reliability, qualities which are basic to any and all job categories. As for the Transit Authority's policy regarding the employment of alcoholics, the analysis in the Authority's brief (at pp. 26-28) and indeed in respondents' brief as well (at p. 30),

demonstrates that this policy involves simply the giving of a limited second chance to employees with at least three years of service. No principle of constitutional law requires the Authority to take the same approach with respect to methadone users.

II.

The Title VII Issue.

A. The Statistical Evidence

The Transit Authority's main brief (at pp. 48-53) demonstrated the irrelevance of the statistics upon which the District Court based its finding of disparate impact, and the District Court's refusal to consider the evidence introduced into the record by the Authority showing that 46% of the Authority's employees are Black and Hispanic, and that these minority groups are employed throughout the Authority in all job categories.

Respondents (at p. 111 of their brief) cite *Furnco Construction Corp. v. Waters*, — U.S. —, 98 Sup. Ct. 2943, 2951 (1978) for the proposition that the Transit Authority's workforce statistics are irrelevant to the issue of whether there has been a Title VII violation in this case. Respondents' reliance on *Furnco* is misplaced. *Furnco* involved charges of disparate treatment rather than disparate impact, and consequently dealt with substantially different elements of proof from those involved in the instant case.

In a case such as the case at bar, in which the charge is disparate impact, where there is no question of disparate treatment, and no history of past discrimination, and where the plaintiff must show that the facially neutral

standards in question "select applicants for hire in a significantly discriminatory pattern", *Dothard v. Rawlinson*, 433 U.S. 321, 329, the employer's workforce statistics are of major significance. In the disparate impact cases which this Court has considered, the very first observation made by the Court was that there was a significant absence of minorities from the particular employer's workforce. *Griggs v. Duke Power Co.*, 401 U.S. 424, 427 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 409 (1975); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977). See also *Townsend v. Nassau County Medical Center*, 558 F. 2d 117, 120 (2d Cir. 1977).

This same approach is reflected in the "bottom line" provision of the new Uniform Guidelines on Employee Selection Procedure, 29 CFR § 1607.4, adopted in August 1978, as well as in the former EEOC Employment Selection Guidelines which provided (in 29 CFR § 1607.13) that selection techniques other than tests might be considered discriminatory if "there are differential rates of applicant rejection from various minority and nonminority or sex groups for the same job or group of jobs or when there are disproportionate representations of minority and nonminority or sex groups among present employees in different types of jobs."

This case is completely devoid of any evidence of differential rates of applicant rejection or disproportionate representation of minorities in the Transit Authority's workforce. On the contrary, the record shows that in a metropolitan area in which the civilian workforce is 15% Black and 5% Hispanic, 46% of the Transit Authority's employees are Black and Hispanic, 39% of its newly hired employees are Black and Hispanic, and these minority

groups are employed throughout the Authority in all job categories. (Petitioners' Brief, pp. 52-53, and Def. Ex. P)

B. The Necessity for Proof of Intent

Respondents assert (at pp. 115-125 of their brief) that the 1972 amendment extending the coverage of Title VII to state and local government employment was based on both the Fourteenth Amendment and the Commerce Clause, and that Title VII can be applied to state and local government employment despite the absence of discriminatory intent.

In *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-453 and fn. 9 (1976), this Court cited the legislative history of the 1972 amendment and expressly noted that the amendment derived from Section 5 of the Fourteenth Amendment.

The Transit Authority's main brief (at pp. 46-48) urges that to the extent that Title VII asserts jurisdiction over the employment practices of government employers, it must be construed in accordance with the constitutional test enunciated in *Washington v. Davis*, 426 U.S. 229 (1976), i.e., there must be proof of discriminatory purpose.

The legislative history of the 1972 amendment to Title VII shows that Congress's concern was with overt and intentional discrimination by state and local government employers. Both the Senate and House Committee Reports (S. Rep. No. 92-415 (1971); H.R. Rep. No. 92-238 (1971)) relied upon a 1969 report of the U. S. Commission on Civil Rights which, as quoted in the House Report, had concluded that:

"The basic finding of this report is that State and local governments have failed to fulfill their obligation

to assure equal job opportunity. . . . Not only do State and local governments consciously and overtly discriminate in hiring and promoting minority group members, but they do not foster positive programs to deal with discriminatory treatment on the job." (1972 U.S. Code Cong. & Ad. News (92nd Congress, Second Session, 2153))

That Congress had no intention of imposing responsibilities on State and local government beyond the responsibilities imposed by the Fourteenth Amendment is demonstrated by its statement that:

"Inclusion of state and local employees among those enjoying the protection of Title VII provides an alternate administrative remedy to the existing prohibition against discrimination perpetuated 'under color of state law' as embodied in the Civil Rights Act of 1871, 42 U.S.C. § 1983." (1972 U.S. Code Cong. & Ad. News (92nd Congress, Second Session, 2154))

Thus, Congress viewed the 1972 amendment as establishing an administrative remedy for state and local employees for the types of discrimination prohibited by the Fourteenth Amendment.

Congress was fully aware of this Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and quoted extensively from *Griggs* in its consideration of employment tests. But there is no indication whatever in the legislative history of the 1972 amendment of any intention by Congress to extend the *Griggs* concept beyond the area of employment tests into the area of employment standards of the type under consideration in the case at bar. (1972 U.S. Code Cong. & Ad. News (92nd Congress, Second Session, 2155-2157))

Furthermore, Congress does not have unlimited power to decide for itself what public agency actions are or are not violations of the Fourteenth Amendment. Even in the expansive view of Congressional power under Section 5 of the Fourteenth Amendment expressed in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Congressional enactment there under consideration was sustained largely on the ground that it was designed to override state laws which were in fact used for purposes of invidious discrimination prohibited by the Fourteenth Amendment, 384 U.S. at 653-656. In *Oregon v. Mitchell*, 400 U.S. 112, 295-296 (1970), Mr. Justice STEWART, in an opinion concurred in by Chief Justice BURGER and Mr. Justice BLACKMUN, observed that while *Morgan* had affirmed the power of Congress to "provide the means of eradicating situations that amount to a violation of the Equal Protection Clause," Congress does not have the power "to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause." 400 U.S. at p. 296.

As indicated in the Transit Authority's main brief (at pp. 46-47), coverage of state and local government employment under Title VII was not, and indeed could not have been based on the Commerce Clause. *National League of Cities v. Usery*, 426 U.S. 833 (1976) precludes federal interference under the Commerce Clause with freedom of government agencies in areas regarded as integral parts of their governmental functions. Determination of the qualifications of prospective employees is an indisputable attribute of state sovereignty and therefore beyond the reach of federal regulation under the Commerce Clause.

III.

The Newly Enacted Amendment to the Rehabilitation Act of 1973.

In their brief in opposition to the petition for certiorari, respondents argued vigorously and at some length (at pp. 26-28 and A1-A6) that this Court should deny the petition on the ground that the Rehabilitation Act of 1973 and the federal regulations promulgated thereunder mooted the constitutional issues posed in the petition. In granting the petition, the Court obviously rejected that argument.

Point I of respondents' brief on the merits renews the identical argument, this time on the basis of a newly enacted amendment to the Rehabilitation Act.

The case at bar involves vastly different considerations from the cases cited by respondents (at pp. 69-70 of their brief) in which this Court dismissed writs of certiorari as improvidently granted. Those cases presented extraordinary combinations of circumstances, including repeal of the statute upon which the litigation was based, new legislation disposing of the issues in the litigation, abandonment by the petitioners of their initial claim for relief, and the absence of more than a handful of persons who would be affected by any decision the Court might render. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955); *Triangle Improvement Council v. Ritchie*, 402 U.S. 497 (1971).

The new amendment to the Rehabilitation Act was passed by the Congress on October 14, 1978, and according to a report in the New York Times, was signed by the President on November 6, 1978. It does not in express terms cover

methadone maintenance patients, and any attempt to interpret it so as to require the employment of such persons is certain to provoke litigation as to its scope and validity.

The new legislation is irrelevant to the important issues raised in the instant case under the Constitution and Title VII, which affect not only the parties to this suit, but other parties involved in similar litigation. (See *Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978))

Respondents' request that this Court reverse its grant of certiorari on the basis of the new legislation is, in effect, a request for an interpretation of the legislation, and for retroactive application of its provisions to this case.

If this Court were to dismiss this case on the basis of the new legislation, such action would constitute compelling precedent in future litigation challenging the scope and validity of the new legislation. Determination of those questions should await the development of a full record in a proper case.

CONCLUSION

For the reasons stated above, as well as those stated in petitioners' main brief, petitioners pray that the judgment of the Courts below should be reversed and the complaint should be dismissed.

Respectfully submitted,

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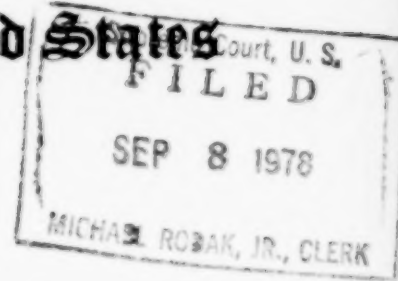
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INTRODUCTORY STATEMENT

Presently at issue before this Court is the hiring policy of the New York City Transit Authority (the "Transit Authority") which excludes from employment all former heroin addicts on methadone maintenance programs.¹

Although methadone maintenance is designed and

¹ Despite the District Court's belief that this amounted to a blanket exclusionary policy, 399 F. Supp. 1032, 1036, the record shows that the Transit Authority will give individual consideration to former addicts who have completed a methadone maintenance program and remained drug free for at least 5 years. (R. Tr. 1/28/75, pp. 709, 714, 715.)

touted as a form of drug abuse rehabilitation, the Transit Authority believes that the program not only fails to rehabilitate even half of its former heroin addict patients, but that it is also impossible to judge under any screening process yet known which former heroin addicts have been or will be successfully rehabilitated.

This conclusion, which led the Transit Authority to adopt its policy, is fully supported by evidence in the record that: As many as 90% of such individuals return to illicit drug use or continue such use while in the methadone program, *infra* at p. 9, n. 11; Many continue to exhibit the general characteristics of drug addiction, such as lethargy, undependability, unpredictable violence and criminal activity, *infra* at pp. 11 and 14; Accurate information as to which methadone patients have been successfully rehabilitated is virtually impossible to obtain, *infra* at p. 13. Methadone program patients, in short, are not only a poor employment risk as a group, but there is no acceptable way of screening them so that the few good risks can be found. Therefore, the safety of the transit riding public, the safety of its employees, the preservation of its property and the efficient operation of the transit system required the adoption by the Transit Authority of its exclusionary policy.

The District Court upheld the Transit Authority's policy with respect to what it called "sensitive" job classifications,² a decision which has not been appealed by Respondents, but held the policy to be in violation

² The District Court defined "sensitive" job classifications to include "subway motorman, subway conductor, subway towerman, bus driver, and jobs dealing with high voltage equipment," 399 F. Supp. at 1058.

of the Equal Protection Clause of the Fourteenth Amendment with respect to what it termed "non-sensitive" jobs.³

In a subsequent opinion, the District Court held that the Transit Authority's policy also violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, with respect to "non-sensitive" jobs. In so finding, the District Court totally disregarded the fact that 46% of the Transit Authority's work force is black or Hispanic, and that such minorities are represented throughout all job categories (Def. Ex. P, R. Tr. 2/12/75, p. 1476). In addition, the District Court found that the Transit Authority had no intent to discriminate, but held that fact to be irrelevant to the Respondents' Title VII claim.

The specific issues before this Court, therefore, are whether the Transit Authority's policy excluding methadone users from employment violates either the Equal Protection Clause or Title VII when applied to so-called "non-sensitive" job classifications.

INTEREST OF AMICUS CURIAE

This brief *Amicus Curiae* of the American Public Transit Association ("APTA")⁴ is submitted in compliance with the requirements of Rule 42 of the Rules of the Supreme Court and pursuant to consent of all

³ To describe any transit system job as "non-sensitive" fails to recognize the nature and magnitude of a transit authority's responsibility to the public, the interaction between transit employees and the public, and the unpredictable behavior of methadone maintained former heroin addicts. See pp. 5 and 8-15, *infra*.

⁴ The American Public Transit Association is a not for profit corporation dedicated to representation of the interests and concerns of public transit. Its membership includes more than 300 public and private bus and rail mass transit systems throughout the country. APTA members provide more than 90%

parties.⁵

The issues before the Court in this case affect not only the New York City Transit Authority, but the mass transit industry as a whole. The scope of the industry and the impact which this case may have on public safety and confidence, management and hiring policies, as well as operations and expenses, is immense. Each year the transit industry provides more than 8 billion rides to members of the public, and in any one instance a single train, for example, may carry as many as 2500 passengers. The magnitude of this responsibility has resulted in an extraordinarily high standard of care in the operation of transit facilities for the use of the public.⁶ In addition, most mass transit systems are publicly owned and funded, at least in part, by tax revenues. Therefore, such systems owe a duty to the tax-paying public to operate in the most efficient manner possible, consistent with a concern for the safety of the public and the transit system's employees.

The District Court's ruling, requiring the Transit Authority to screen and hire methadone using job applicants for "non-sensitive" positions, jeopardizes

⁵ Letters from Ms. Joan Offner, on behalf of the New York City Transit Authority dated August 18, 1978, and from Mr. Eric Balber on behalf of Respondents Beazer, et al., dated August 22, 1978, copies of which have been filed separately with the Court.

⁶ A public carrier's extraordinary duty of care is well documented in the law of every state and therefore necessarily affects the decision making process of transit management at all levels of operation. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 234 (5th Cir. 1976); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 865 (7th Cir. 1974).

these important public duties and deprives transit management of the ability to determine the quality of its employee work force.

The District Court's conclusion that there is such a thing in a transit system as a "non-sensitive" job, a conclusion reached by the lower court without any substantial input from the parties, is absolutely central to Respondents' case. APTA submits that there are no "non-sensitive" job classifications when the nature and magnitude of a transit system's responsibility to the public is properly taken into account.

Based upon testimony in the record regarding such tendencies, *infra*, p. 14, the transit industry has good reason to fear that a methadone using employee, no matter what his job classification, might assault or steal from another employee, or might through negligence or some willful or uncontrollable act damage the transit system's property or endanger the lives of employees and riders. It is neither difficult nor unduly speculative for a transit system to envision a mechanic failing to properly fix or maintain some vital bus or subway part because he has returned to illicit drugs or because he is under tremendous physical and emotional pressure to do so. Such an error could endanger many lives. It is also easy to envision even a bus washer or station maintenance employee unpredictably and for no logical reason assaulting another employee or a transit rider or doing so in order to obtain money to support a return to hard drugs, *infra*, pp. 11 and 14. Any member of a transit system's security force will wear or have access to firearms, and any employee who works in any capacity near central control equipment (the computerized equipment controlling train separation and speed) could accidentally or purposefully cause a catastrophic collision or derailment.

Less dramatic, but just as real a concern to transit management, is the methadone maintained employee who has an unusually high absentee rate, performs his job lethargically and unsatisfactorily, and suffers chronically from the side-effects and after-effects of heroin addiction. All of these concerns are real, not conjectural. In fact, there is the statistical certainty, as evidenced in the record, *infra* at p. 9, that if the Transit Authority did not have its present hiring policy, a large percentage of methadone using employees would return to the use of illegal drugs while in the transit system's work force. Under such circumstances, APTA submits that no job classification can be considered "non-sensitive."

Because this matter is of such grave concern to the mass transit industry, APTA submits this brief in the hope of providing an additional perspective to the factual problems and legal issues at hand.

SUMMARY OF PROCEEDINGS

This case arises in a somewhat unusual context. The District Court's opinion, filed on August 6, 1975, 399 F. Supp. 1032 (S.D. N.Y. 1975), set forth findings of fact and conclusions of law directed solely to the question of whether the Transit Authority's hiring policy with respect to placement of methadone users in "non-sensitive" job classifications violated the Equal Protection Clause of the Fourteenth Amendment. The Court, however, failed to clearly state whether it was applying a "strict scrutiny" standard of review, applicable to deprivation of fundamental rights or based upon suspect classifications such as race or alienage,

Shapiro v. Thompson, 394 U.S. 618 (1969), or a "rational basis" analysis applied to all other state actions challenged under the Equal Protection Clause. *Dandridge v. Williams*, 397 U.S. 471 (1970). Although the lower court opinion frequently employs rational basis language, its searching review, and weighing and balancing of the evidence suggests the application of the strict scrutiny standard.

In affirming the District Court, the Court of Appeals' decision also reflects the application of a strict scrutiny standard, in that the decision cites two strict scrutiny cases. 558 F.2d 97, 99 (2d Cir., 1971).

The Title VII issue was not addressed until May 5, 1976, when the District Court entered its Supplemental Opinion, 414 F. Supp. 277 (S.D. N.Y. 1976), concluding without additional findings that Title VII had also been violated, and awarding attorneys' fees thereunder. Again, the rationale for the decision was left in question because the Court did not clearly indicate whether it was applying the *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), "disparate impact" standard or the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), "disparate treatment" analysis. Because the District Court subsequently changed the basis for its award of attorneys' fees, the Court of Appeals did not address Title VII at all. 558 F.2d at 99-100 (1977).

On June 26, 1978, this Court granted a writ of *certiorari* in this matter, certifying only the equal protection and Title VII issues for appeal. 46 U.S.L.W. 3792 (1978).

METHADONE MAINTENANCE AS A FORM OF DRUG ADDICTION REHABILITATION

Methadone maintenance as a treatment for heroin addiction began in 1964 when Drs. Dole and Nyswander showed that heroin addicts maintained on a constant dose of methadone, rather than being rapidly withdrawn as had been the previous practice, became more alert and energetic, and less dependent upon regular doses of heroin. Additional patients were included in the study, and they too demonstrated positive behavior changes.⁷ Based on the initial successes of Dole and Nyswander,⁸ researchers began to initiate large-scale maintenance programs in other cities. The 1971 establishment of the Special Action Office for Drug Abuse Prevention provided a strong governmental commitment to methadone maintenance accompanied by infusion of substantial federal money into drug abuse treatment. Thus, there was a massive expansion of methadone programs around the country, peaking in 1975 at 135,000 patients, with 35,000 patients in New York City alone.⁹

Sadly, however, methadone maintenance has failed to live up to the expectations generated by Dole and Nyswander's early experiences. Inflated hopes for a heroin "cure" created by intense initial publicity have

⁷Dole and Nyswander, "A Medical Treatment of Diacetylmorphine (heroin) Addiction", 193 J.A.M.A. 80 (1964).

⁸Dole, Nyswander, and Warner, "Successful Treatment of 750 Criminal Addicts", 206 J.A.M.A. 2708 (1968).

⁹Bourne, *Methadone: Benefits and Shortcomings*, Drug Abuse Council, Washington, D.C., 1975, p. 3.

not been realized.¹⁰ Maintenance programs have attracted tens of thousands of addicts to treatment and to contact with treatment personnel, and have enabled some individual patients to reorder their lives in a constructive manner. However, according to such measures as retention in the treatment program, abstinence from drugs following detoxification, avoidance of drug abuse during treatment, and reduced criminality, the percentage of patients who actually achieve this transformation is much smaller than originally predicted.¹¹ Studies have repeatedly shown that seldom more than 50% of such individuals are capable of holding a steady and responsible job,¹² and that this figure often falls as low as 17-20%.¹³ In addition, those

¹⁰*Id.* at 19. See Also Zinbert, "The Crisis in Methadone Maintenance", 296 New England Journal of Medicine 1000,1001 (1977).

¹¹Bourne, *supra*, note 9, at 3.

¹²*Id.* at 4-5 (noting that the one-year retention rates for methadone programs varied from 20% to 80%, but averaged at only 50%).

¹³Stimmel, Goldbert, Rotkopf, and Cohen, "Ability to Remain Abstinent After Methadone Detoxification: A Six-Year Study", 237 J.A.M.A. 1216 (1977). This study measured the ability of 335 patients (out of 823 total admissions) at New York City's Mount Sinai Methadone Maintenance and Aftercare Treatment Program who were successfully detoxified over a six-year period. Of this group only 17% were considered by the staff to have properly completed treatment; 30% were detoxified due to voluntary discharge; 30% for violations of program rules; and 24% were arrested. Eighty percent were located for the follow-up study. Only 35% of those contacted had remained drug-free, 58% had returned to narcotic use, 4% were incarcerated, and 4% were dead. See also Hunt and Odonoff, *Follow-up*

few studies that have shown unusually high success rates have been subjected to serious methodological criticism.¹⁴

Study of Narcotic Drug Addiction After Hospitalization, Public Health Report 77, 1962, pp. 41-54. (90% of 1,912 addicts discharged from the Public Health Service Hospital were back on drugs within a six-month period); Gearing, "Methadone Maintenance Treatment: Five Years Later: Where Are They Now?", 64 Public Health Journal (supp.) pp. 44-50 (1974) (83% of patients discharged from New York detoxification programs within five years had either been arrested at least once, hospitalized for a second detoxification, or enrolled in a treatment program); Bewley and Ben-Aris, "Morbidity and Mortality From Heroin Dependence: Study of 100 Consecutive Patients", 1 British Medical Journal 727-729 (1968) (86% of addicts in British study unable to achieve abstinence).

¹⁴Bloch, Ellis, and Spielman, "Use of Employment Criteria for Measuring the Effectiveness of Methadone Maintenance Programs", 12 International Journal of the Addictions 161 (1977) (although 70% employment rate reported, the sample selected included only patients who had been in the program longer than two years, and half again of these were further excluded for unknown reasons); Epstein, "Methadone the Forlorn Hope", 36 Public Interest 3 (1974) (disputing magnitude of crime reduction rate reported by Dr. Gearing in the New York Program); Bourne, *supra*, note 9 at 8-10 (success rates based on employment statistics are speculative because much of the reported employment is in the drug abuse field, the statistics often omit dropout rates, and there is little regard for the type, amount, or quality of the work done). Bourne notes that "[p]erhaps as with crime rates the most one can say about the relationship between methadone maintenance and productivity is that there appears to be a qualitative correlation, but one of largely indeterminable magnitude. Manipulation of data and admission criteria, definitional problems with regard to individuals who held brief, part-time, or temporary jobs, all seem to obscure accurate measurement of the magnitude of the correlation." *Id.* at 9; See also Wallace and Keil, "Illicit Opiate Use During Methadone Maintenance", 13 International Journal of the Addictions 241 (1978) (citing

Those who ultimately prove unsuited for employment often exhibit such behavior as return to illegal drug abuse¹⁵ and/or criminal activity.¹⁶ Even Dole and Nyswander have now recognized that prolonged addiction appears to cause serious psychological and physiological changes not remedied by methadone maintenance.

studies arguing that methadone "success" may be related to methodological quirks, this study argues that Dole and Nyswander's original blockade theory of methadone action has yet to be scientifically confirmed); Klein, "Evaluation Methodology", 12 International Journal of the Addictions 837 (1977) (studies evaluating the success of methadone treatment critiqued based on vague or ambiguous criteria measures and unverified patient self-reports; the author concludes that "available data does not allow for resolution of the pro- or anti-methadone conflict.")

¹⁵Ruiz, Longred, et al., "Social Rehabilitation of Addicts: A Two-Year Evaluation", 12 International Journal of the Addictions 173 (1977) (36% and 54% of patients in two New York clinics showed at least one positive urine test containing illicit drugs during six months following admission, primarily indicating barbiturates and cocaine); Perkins and Black, "Summary of a Methadone Maintenance Treatment Program", 126 American Journal of Psychiatry 10 (1970) (20% of methadone patients at New York's Beth Israel used illicit drugs as shown by urine samples during a two-year period); Floyd, Katon, DuPont, and Rubenstein, "Detoxification: What Makes the Difference?", in *Proceedings of the Fifth National Conference on Methadone Treatment*, National Association for the Prevention of Addiction to Narcotics, 1973, pp. 284-87 (growing evidence of alcohol and valium abuse among methadone patients).

¹⁶Ruiz, Longred, et al., *supra*, note 15 at 173 (12% and 14% of two New York patient populations were arrested at least once during the first 18 months of treatment).

nance.¹⁷ Additionally, methadone programs have been persuasively criticized because of the questionable morality of substituting one addictive opiate for another;¹⁸ the reason being that any legitimate drug abuse treatment should lead to abstinence and not to continued dependency.

Despite extensive medical and scholarly treatment and study of methadone maintenance methodology and results, as set forth herein, none of the articles or books have suggested that there is any dependable way to identify in advance, even after lengthy treatment, those former addicts who will ultimately be successfully rehabilitated.

In short, drug abuse rehabilitation remains an inexact science. The characteristics of drug addiction, such as lethargic, undependable and criminal behavior, remain significant characteristics of methadone maintenance patients despite the continuing efforts of the medical profession.

SUMMARY OF EVIDENCE IN THE RECORD

In addition to the medical uncertainty of methadone maintenance treatment programs, there are many practical considerations fully documented by creditable evidence in the record, which more than justify the

¹⁷Dole and Nyswander, "Heroin Addiction - A Metabolic Disease", 120 Archives of Internal Medicine 19 (1967) (prolonged opiate drug addiction alleged to produce permanent metabolic changes that require permanent opiate maintenance).

¹⁸Bourne, *supra*, note 9 at 17; Zinberg, *supra*, note 10 at 1001.

Transit Authority's policy. Just a few of the problems reflected in the record, which the New York City Transit Authority and other members of the transit industry would face in attempting to adequately screen methadone using job applicants, as the District Court opinion suggested, may be summarized as follows:

1. Methadone treatment programs vary greatly in quality, many fail to conform to federal and state regulations and, in fact, a large portion of the total methadone distribution is handled by private physicians for profit without any attendant counseling services (R. Tr. 1/9/75 p. 251);
2. Even those clinics which do meet certain minimum standards are so over-extended that they are almost completely unable to address and analyze the side effects, physical and psychological, of methadone treatment in each individual patient (R. Tr. 1/10/75, pp. 424-426);
3. Advice regarding the employability of a given patient is both inadequate and suspect for a number of reasons (R. Tr. 1/9/75, p. 168) - a) there are very few professional employees associated with these programs who are qualified to make employability decisions (R. Tr. 1/10/75, p. 349; b) a great deal of information pertinent to employment is subject to doctor-patient confidentiality (R. Tr. 10/25/74, p. 424) and federal regulatory confidentiality requirements (42 CFR §2.1 et seq.); c) rapid staff turnover makes it even more difficult for the clinic to supply, or the employer to obtain accurate information (R. Tr. 1/9/75, p. 257); and d) there is an inherent conflict of interest which often leads methadone programs to give unjustifiably high recommenda-

tions to patients in order to place them in jobs, whether or not they are qualified (R. Tr. 10/22/74, pp. 38-39; 1/10/75, p. 347).

Even if a transit authority were to undertake the substantial additional expenses and commitment of administrative resources necessary in order to make the best possible employability decisions under the circumstances, the record reveals that insurmountable difficulties would remain. Studies indicate that anywhere from approximately 50% to 90% of methadone maintained patients continue to use heroin or other hard drugs on occasion. (R. Tr. 10/22/74, pp. 23-24; 1/10/75, p. 418). In addition, methadone withdrawal is known to be accompanied by increased consumption of alcohol and abuse of amphetamines and barbiturates (R. Tr. 1/10/75, p. 454), and such disruptive physical side effects as vomiting, nausea, respiratory infection, hepatitis, tympano mastoiditis, and dizziness (R. Tr. 10/22/74, p. 26; 10/25/74, pp. 432, 438, 448). There is also evidence that addiction to heroin, and perhaps even methadone use, leads to long lasting physiological and psychological disorders which may be evidenced unexpectedly in unpredictable and sometimes violent behavior (R. Tr. 1/7/75, p. 128; 10/22/74, pp. 69-70).

This increased propensity for violent or even criminal behavior (R. Tr. 1/28/75, pp. 629-30, 645-46, 677-78) is one of the more disturbing characteristics of methadone maintained former addicts. Hiring from such a group would put any transit system in a particularly difficult situation given a common carrier's extraordinarily high standard of care with respect to the public.¹⁹ Placing an employee with such statistically

¹⁹See note 4, *supra*.

proven propensities in any job position might well be considered negligence *per se* on the part of the Transit Authority if someone were robbed, assaulted or injured as result of an employee's willful, negligent, or uncontrollable act.

As the Respondents' witness Dr. Dupont said during examination by the Court, an employer must "take a leap of faith" in hiring a methadone using applicant (R. Tr. 10/22/74, p. 41).

QUESTIONS PRESENTED

- I. Is the Petitioner's denial of employment in "non-sensitive" positions to former heroin addicts participating in methadone maintenance programs an unconstitutional denial of equal protection under the Fourteenth Amendment?
- II. Is the Petitioner's denial of employment to former heroin addicts participating in methadone maintenance programs unlawful racial discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*?

SUMMARY OF ARGUMENT

I. The Equal Protection Clause of the Fourteenth Amendment

The Respondents' equal protection claim is valid only if there is no rational basis for the classification which they claim to be discriminatory. The record, however, clearly provides such a rational basis for the Transit

Authority's conclusion that an exclusionary policy is necessary.

Despite the recognized fact that some percentage of methadone treatment patients are employable, the record is also unquestionably clear that many are not only unemployable but dangerous to their fellow employees and to the transit riding public, that the science of drug addiction treatment remains highly subjective, and that it is often impossible to obtain the type of accurate information that even a highly trained physician would need in order to make an educated, but still uncertain, judgment as to employability.

II. Title VII of the Civil Rights Act of 1964

Due to the procedural history of this case the Title VII issue was inadequately explored by the District Court and totally disregarded by the Court of Appeals. Nonetheless, because of the District Court's finding that the questioned classification was not formulated or applied with discriminatory intent, the Title VII claim may be disposed of in favor of Petitioner without remand for further findings. In view of this Court's recent decision in *Furnco Construction Corp. v. Waters*, 46 U.S.L.W. 4966 (June 29, 1978), and the constitutional basis of the application of Title VII to state and local governments, it is clear that discriminatory intent, actual or implied, remains a necessary element of a Title VII claim.

In addition, the District Court misapplied Title VII when it singled out one job requirement among the many job-related considerations which go into every

hiring decision, and failed to give any consideration whatever to the Transit Authority's overall hiring results.

I.

THE TRANSIT AUTHORITY'S POLICY OF NOT HIRING METHADONE USERS DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Respondents have alleged and maintained throughout this litigation that the Transit Authority's rule excluding methadone maintenance patients, as well as present and past drug addicts, from "non-sensitive" job positions is an irrational classification in violation of the Equal Protection Clause of the Fourteenth Amendment. It is submitted, for the reasons set forth below, that this contention is erroneous.

A. The Rational Basis Standard of Review Should be Applied in This Case.

This Court has on many occasions outlined the two separate tests which may be applied to an equal protection claim: the "strict scrutiny" test, applied when the challenged action operates to infringe or deny a fundamental right or employs a suspect classification such as race or sex, requires that the defendant show that there is no reasonable, less discriminatory alterna-

tive. *Shapiro v. Thompson*, 394 U.S. 618 (1969); and the "rational basis" test, applied in the absence of a fundamental right or suspect classification, merely requires that there be some evidence of a rational relationship between the legitimate purpose of the classification and the means of achieving that purpose. *Dandridge v. Williams*, 397 U.S. 471 (1970). Neither the District Court nor the Court of Appeals, however, have directly addressed the question of which test should be applied in the present case.

The District Court, while speaking in terms of "rational relation" and "rational basis," 399 F. Supp. at 1057, cited and apparently relied upon cases which applied the strict scrutiny standard.²⁰ Certainly, the District Court's searching review of the evidence, acknowledging the significance of the Transit Authority's concerns, balancing those concerns against the needs of the plaintiff class, and concluding that less offensive means of achieving its goals were available to the Transit Authority, falls in the category of strict scrutiny, by whatever name it is called.

Similarly, the Court of Appeals spoke in terms of applying the "rational relation" test, but relied solely upon cases in which a strict scrutiny standard was applied.²¹ 588 F.2d at 99.

²⁰*Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 94 S. Ct. 791, 39 L.Ed.2d 52 (1974); *Sugarman v. Dougall*, 413 U.S. 634, 93 S. Ct. 2842, 37 L.Ed.2d 853 (1973); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 77 S. Ct. 752, 1 L.Ed.2d 796 (1957); *Baker v. Columbus Municipal Separate School District*, 329 F. Supp. 706 (N.D. Miss. 1971), *aff'd*, 462 F.2d 1112 (5th Cir. 1972).

²¹*Sugarman v. Dougall*, 413 U.S. 634 (1973); *Crawford v. Cushman*, 531 F.2d 1114 (2d Cir. 1976).

Respondents, on the other hand, now admit that rational basis, and not strict scrutiny, is the appropriate measure of their equal protection claim. (Brief in Opposition to Certiorari, p. 21.) This conclusion is undeniably correct in view of the fact that employment by the state or any political subdivision of the state is not a fundamental right, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976), nor is a classification based upon addiction to narcotics a suspect classification. *Marshall v. United States*, 414 U.S. 417, 421-22 (1974). Application of the rational basis test is, therefore, appropriate.

B. The Transit Authority's Employment Policy Meets the Rational Basis Test.

The rational basis test was described by this Court in *Dandridge v. Williams*, 397 U.S. 471 (1970), by reference to several earlier characterizations:

If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369. "The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70, 33 S.Ct. 441, 443, 57 L.Ed. 730. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393.

397 U.S. at 485.

The clear message in this language and in numerous other cases decided before and after *Dandridge*, is that in the absence of some fundamental right or suspect classification, the duly authorized actions of a state or political subdivision thereof will be upheld as long as any creditable evidence provides a rational basis for the action in question.

Given these guidelines, it is submitted that neither the District Court nor the Court of Appeals properly applied the rational basis test, if they in fact applied it at all. As shown above, this fact is most vividly demonstrated by the District Court opinion, which dedicated page after page to analysis of evidence in the record supporting the Transit Authority's policy. In each instance, though giving substantial credence to the concerns of the Transit Authority, the District Court chose to explain away those concerns by suggesting alternative means of dealing with the problems. In so doing the Court chose to ignore or cast aside a great deal of highly creditable evidence which, it is submitted, more than satisfies a proper application of the rational basis test to the facts of this case.

Among the many equal protection decisions rendered by the Supreme Court in recent years, at least three are closely analogous to the present circumstances and provide a more appropriate application of the rational basis test to the facts of this case. Perhaps the most instructive case factually is *Marshall v. United States*, 414 U.S. 717 (1974), where the Court upheld a provision of the Narcotic Rehabilitation Act of 1966, 18 U.S.C. §4251, *et seq.*, disallowing the benefits of that Act to narcotics addicts with two or more prior

felony convictions. Even though the two felony limitation was in a sense arbitrary, in that the line could have just as easily been drawn at one or three convictions, the Court concluded that this was a matter of "legislative, not judicial choice." 414 U.S. at 428. More to the point, however, the Court recognized, and documented at some length, the difficulty and uncertainty involved in medical rehabilitative treatment of narcotics addicts:

As testimony before both the House and Senate committees revealed, the treatment process for narcotics addiction is an arduous and a delicate undertaking, particularly in the after care stage when the subject is released into an unstructured environment which requires from the addict strict obedience to the limitations of the prescribed regime and full cooperation in the rehabilitative efforts. (footnote 9 set forth below)

Additionally, there is no generally accepted medical view as to the efficacy of presently known therapeutic methods of treating addicts and the prospect for the successful rehabilitation of narcotics addicts thus remains shrouded in uncertainty. Indeed, even the premise that drug addiction is one of the significant root causes of crime is not without challenge. (citations omitted) *As testimony before the Congress revealed, no evidence to date has demonstrated more than a speculative chance for the successful rehabilitation of narcotics addicts.* (emphasis added)

* * *

When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation, even assuming, *arguendo*, that judges with

more direct exposure to the problem might make wiser choices.

414 U.S. at 426-427.

In footnote 9 of the *Marshall* opinion the Court further relied upon Senate Committee Report findings that treatment of drug addicts is at best an inexact science.

The Senate Report states:

"The process is extremely complex and difficult, involving sustained therapy, principally psychiatric, and perhaps a return to the community in stages, utilizing short visits, a halfway house, a work camp, or some similar facility.... In addition, some sanction should be available to enforce the cooperation of the addict in the post-hospitalization period." S. Rep. No. 1667 at 15.

Id. at 426.

These concerns, expressed by this Court in its 1974 opinion, the same year in which the present matter reached trial, appear to be similar to the concerns which led the Transit Authority to adopt its policy of not employing drug addicts and methadone treatment patients in either sensitive or non-sensitive job classifications. Although the line might have been drawn in a different place, the Transit Authority certainly had sufficient grounds, based upon the uncertainties of methadone treatment, as recognized by the Court in *Marshall*, to rationally conclude that it was in the best interest of the public to adopt such a rule.

Another recent decision of this Court which bears directly upon the present circumstances is *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 319 (1976), wherein the Court upheld a Massachusetts statute setting mandatory retirement for state police at the age

of 50. Notwithstanding clear evidence in the record that some individuals over 50 years of age are as physically capable of performing a state policeman's duties as many others under 50, and that physical examinations could have been substituted for the arbitrary standard, the Court found no violation of equal protection.

There is no indication that §26(3)(a) has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute.

That the State chooses not to determine fitness more precisely through individualized testing after age 50 is not to say that the objective of assuring physical fitness is not rationally furthered by a maximum-age limitation. It is only to say that with regard to the interest of all concerned, the State perhaps has not chosen the best means to accomplish this purpose. But where rationality is the test, a State "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Dandridge v. Williams*, 397 U.S., at 485, 90 S.Ct. at 1161. (footnotes omitted)

427 U.S. at 316.

Unlike the circumstances in *Murgia*, the record reveals in the present case that it is unlikely that the Transit Authority could determine, with any amount of effort and expense, which methadone user applicants for employment are most likely to be reliable employees. Consequently it was not irrational, as in *Murgia*, for the Transit Authority to deal with the situation by excluding all such applicants.

Similarly, in *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977), this Court upheld an

Ohio statute denying unemployment benefits to all persons whose unemployment is "due to a labor dispute other than a lockout." Ohio Rev. Code §4141.29(d)(1)(a). Again setting forth the parameters of equal protection analysis, the *Ohio Bureau* Court stated that:

Appellee in effect urges that the Court consider only the needs of the employee seeking compensation. The decision of the weight to be given the various effects of the statute, however, is a legislative decision, and appellee's position is contrary to the principle that the "the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." *Dandridge v. Williams*, 397 U.S. 471, 486, 90 S.Ct. 1153, 1162, 25 L.Ed.2d 491 (1970). In considering the constitutionality of the statute, therefore, the Court must view its consequences, not only for the recipient of benefits, but also for the contributors to the fund and for the fiscal integrity of the fund.

431 U.S. at 490.

Even though Ohio's statute was so broad as to include employees who were not voluntarily unemployed as a result of a labor dispute, the Court acknowledged the state's right to establish such classifications where some rational basis may be cited.

Although one might say that this system provides only "rough justice," its treatment of the employer is far from irrational. "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31

S.Ct. 337, 55 L.Ed. 369." *Dandridge v. Williams*, 397 U.S. at 485, 90 S.Ct. at 1161. The rationality of this treatment is, of course, independent of any "innocence" of the workers collecting compensation.

431 U.S. at 491, 97 S.Ct at 1909-10.

Perhaps the most important aspect of the *Ohio Bureau* decision, from the standpoint of the Transit Authority and the transit industry, is the welcome recognition that the needs of the employee are not the only meaningful measure of rationality. The present case provides an excellent example of an instance in which the employees' or applicants' needs may be genuine, but cannot rationally be said to outweigh the needs of the Transit Authority, the transit riding public and the taxpayer.

Where, as here, the challenged action is based upon the employer's rational concern about the difficulty of recruiting and selecting qualified employees, the potential risk of harm to the transit riding public, and the additional personnel and supervision costs which would be borne by the taxpaying public if such a hiring program were undertaken, the Equal Protection Clause, as interpreted by the decisions of this Court, is not violated.

II.

THE TRANSIT AUTHORITY'S HIRING POLICY WITH RESPECT TO METHADONE USERS HAS NOT BEEN APPLIED WITH DISCRIMINATORY INTENT, NOR HAS IT HAD A DISCRIMINATORY IMPACT UPON MINORITIES IN VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

As discussed at greater length above, the Respondents' complaint contained allegations of discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* However, the District Court's original findings and decision, entered August 6, 1975, 399 F.Supp. 1032, addressed only the equal protection claim. Not until Respondents moved for an award of attorneys' fees pursuant to 42 U.S.C. §2000e-5(h), did the District Court file an opinion summarily concluding that Title VII had been violated and awarding attorneys' fees in excess of \$350,000.

As the Court of Appeals acknowledged, the Respondents "concededly pressed their Title VII claim for the sole purpose of obtaining attorneys' fees" under the Act. 558 E.2d 97, 99 (1977). Following enactment of the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. §1988, however, the District Court entered its Amended Permanent Injunction and Judgment awarding, *inter alia*, attorneys' fees based upon this new statutory provision rather than upon §2000e-5(h), which must be premised upon a violation of the Civil Rights Act. Because of this later ruling, the Court of Appeals found it unnecessary to deal with the Title VII issues presented in this case. 558 E.2d at 99-100.

This procedural confusion has left the Title VII issue without thorough consideration or delineation in the lower courts. The District Court held in its brief opinion that "Title VII does not require a purpose or intent to carry out racial discrimination" and that the Transit Authority's policy "while not adopted with a purpose of racial discrimination, has been shown to have a substantially greater impact on minority groups than on whites." The District Court went on to conclude that "[s]ince the policy is not grounded in

any business necessity, it violates Title VII." 414 F. Supp. at 278-279. In so holding the District Court appears to have relied almost exclusively upon *Griggs v. Duke Power Co.*, 401 S.Ct. 424 (1971).

It is submitted, at the outset, that this is an inappropriate and inadequate treatment of the complex and profoundly important Title VII questions raised in this case. Whatever the present status of the lower court's Title VII holding may be, however, the conclusion that Title VII has been violated is believed to be incorrect for at least the following reasons:

1. The *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), "disparate treatment" test, and not the *Griggs* "disparate impact" standard, should have been applied to this case, as modified and explained by this Court's recent decision in *Furnco Construction Corporation v. Waters*, 46 U.S.L.W. 4966 (June 29, 1978).
2. Even if the *Griggs* test is appropriate, that standard should also be modified by the Court's reasoning in *Furnco*.
3. Even if the *Griggs* test is applied, the Transit Authority's employment policy with respect to methadone users is only a "subtest" of the Authority's overall employment qualification requirements and, therefore, should be judged in light of overall hiring results.
4. A Title VII claim against the Transit Authority, a municipal rather than a private corporation, requires proof of intent to discriminate, admittedly lacking in the present case.

A. The McDonnell Douglas Standard Should be Applied in This Case.

The standard of Title VII review originally set forth in *Griggs v. Duke Power Co.*, *supra*, was there applied to employment testing, where intelligence, ethnic and social background, and formal education have historically been used as facially non-discriminatory hiring standards. The Court held that such tests, if they have a disparate impact upon minority job applicants, must be justified as being job related in order to avoid the presumption of racially discriminatory intent. 401 U.S. at 431. Even arguably job related tests or requirements must pass this "business necessity" requirement by showing that there is no reasonable alternative means by which to achieve the same goal without discriminatory impact. The *Griggs* Court's principle line of reasoning appears to have been that employment tests have been so misused by employers in the past, and are so difficult to objectively review for discriminatory intent, that an extraordinary standard was justified. *Id.* at 432. The fact that *Griggs* was a class-action does not appear to have been a controlling factor in determining that such a standard was needed.

McDonnell Douglas Corp. v. Green, *supra*, on the other hand, was a non-class action case which addressed other employment practices which allegedly result in discrimination because of "disparate treatment" of a minority applicant or employee. In this situation the Court fashioned a very different standard. A plaintiff may prove a *prima facie* case of discrimination by showing that: 1) he belongs to a racial minority; 2) he applied and was qualified for the job or promotion; 3) was turned down; and 4) subsequently, the employer continued to look for employees with the same

qualifications. 411 U.S. at 802. Such circumstances are adequate to imply intent, however, the employer has the opportunity to rebut that presumption by showing "some" legitimate nondiscriminatory reason for the employee's rejection." *Id.* at 802. Proof of business necessity, by showing that there is no reasonable alternative to rejection of the employee, is not required.

That respondents have alleged discriminatory impact and seek to represent a class should not, without more, determine the standard by which their claim will be judged. Rather, the substantive nature of the claim should determine the standard applied.

Because the present case does not involve an employment test, and because the challenged employment practice is merely one of many standards by which all Transit Authority job applicants are screened, it is believed that *McDonnell Douglas* provides the most appropriate analysis for this case.

This Court recently, in *Furnco Construction Corporation v. Waters*, 46 U.S.L.W. 4966 (June 29, 1978), explained at great length, and to some extent modified, the *McDonnell Douglas* "disparate treatment" analysis with respect to an allegedly discriminatory hiring practice. In so doing the Court noted that the *Griggs* analysis, applied by the District Court in this case, was inappropriate because the alleged discrimination did not involve an employment test. A close review of the *Furnco* decision, therefore, is the most appropriate means of analyzing the present status of the *McDonnell Douglas* standard, and its proper application to this case.

In *Furnco*, the plaintiffs were three black bricklayers who sought but were initially denied employment on a

construction project. It was admitted that these individuals were qualified for the jobs they sought, and, in fact, two were later hired. Although the District Court found no violation of Title VII, the Court of Appeals held that the facts presented a *prima facie* case of race discrimination not adequately rebutted by the employer. This Court granted *certiorari* to consider "the exact scope of the *prima facie* case" and "the nature of the evidence necessary to rebut such a case." 46 U.S.L.W. at 4967.

The touchstone in cases such as *Furnco* and the present case, according to the Court "is always whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex or national origin.' *International Brotherhood of Teamsters v. United States*, *supra* (431 U.S. 344) at 335 n. 15." 46 U.S.L.W. at 4969. (emphasis added). Justice Rhenquist, speaking for the majority, noted that the four step method of establishing a *prima facie* case of "disparate treatment" suggested in *McDonnell Douglas*, *supra*, 411 U.S. at 802, "was never intended to be rigid, mechanized, or ritualistic," *Furnco*, *supra*, at 4969, and that proof of a *prima facie* case "raises an inference of discrimination only." *Id.* The inference of discriminatory intent is allowed, as it was in *Griggs*, because of the difficulty, and sometimes impossibility, of proving actual intent, and because our experience allows us to reasonably infer that such "acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Id.* It is clear, however, that such an inference is only an acceptable alternative for proof of actual discriminatory intent when unrebutted, and not a removal of intent, actual or implied, as a necessary element of proof in a Title VII action.

This conclusion is borne out by this Court's further analysis in *Furnco* of the employer's proper response to a *prima facie* case.

When the *prima facie* case is understood in the light of the opinion in *McDonnell Douglas*, it is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race. . . . To dispel the adverse inference from a *prima facie* showing under *McDonnell Douglas*, the employer need only "articulate some legitimate nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, *supra*, at 802.

Id. at 4969.

Of course, the employee must be given the opportunity to prove that the employer's explanation of his actions are merely "a pretext for discrimination." *Id.* A court may not, however, find a violation of Title VII simply because "different practices would have enabled the employer to at least consider, and perhaps hire, more minority employees." *Id.*

Finally, this Court addressed the employer's use of favorable minority hiring statistics as a means of disproving discriminatory intent. While being careful to point out that hiring statistics do not necessarily disprove discriminatory practices in any specific instance, this Court held that such favorable statistics may be highly probative evidence which the *Furnco* Court of Appeals was in error to disregard.

A *McDonnell Douglas prima facie* showing is not the equivalent of a factual finding of discrimination, however. Rather, it is simply proof of actions taken by the employer from which we infer discriminatory *animus* because experience has proved that in the absence of any other explana-

tion it is more likely than not those actions were bottomed on impermissible considerations. When the *prima facie* showing is understood in this manner, the employer must be allowed some latitude to introduce evidence which bears on his motive. Proof that his work force was racially balanced or that it contained disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided.

Id. at 4970.

If this Court's teaching in *Furnco* may be applied to the present case, it is apparent that the District Court erred in several respects. First, the District Court erroneously concluded that intent, actual or implied, was not a necessary element of a Title VII violation. In fact, the Court specifically found that the Transit Authority's policy was "not adopted with a purpose of racial discrimination." 414 F. Supp. at 278 and 279. Nonetheless, relying solely upon the disparate impact of the Transit Authority's policy, the District Court found a Title VII violation.

Second, the District Court applied an erroneous standard for rebuttal of a *prima facie* case when it concluded in a single sentence that "[s]ince the policy is not grounded in any business necessity, it violates Title VII." 414 F. Supp. at 279. Such a standard, as stated and as applied, is directly in conflict with this Court's teaching in *Furnco* and *McDonnell Douglas* that "the employer need only 'articulate some legitimate nondiscriminatory reason for the employee's rejection.' *McDonnell Douglas*, *supra*, at 802." *Furnco*, *supra*, at 4969. In any event, it is believed that the District Court was clearly erroneous in its findings of fact under either standard in concluding that use of the narcotic drug

methadone as an exclusionary job criterion, was "not shown to be related to job performance." 414 F. Supp. at 278. Indeed, the record is replete with evidence indicating that at least a certain percentage of all methadone users are totally unemployable because they have already returned to or will return to use of other narcotic drugs, exhibit criminal tendencies, are unreliable and untrustworthy, and are safety risks both to the public and to other employees.²²

Third, the District Court refused to even consider the Transit Authority's statistical proof that its employee work-force was approximately 46% minority (Def. Ex. P, R. Tr. 2/12/75, p. 1476), while the general population within its jurisdiction was only 15% black and 5% Hispanic. 414 F. Supp. at 279. This is in direct contrast to this Court's admonition that such evidence, though not dispositive, is relevant to the issue of discriminatory intent and, therefore, should not be ignored. *Id.* at 4970.

In short, the District Court simply failed to recognize the employer's right, in the absence of discriminatory intent, to make a reasonable business judgment that the difficulty involved in determining which members of this group are employable, and the attendant risks if an incorrect decision is made, justify exclusion of the

²²See Notes 11 through 16, *supra*, and references to the Trial Record at pp. 12-15, *supra*.

entire class.²³

**B. The Griggs Test, if Applied in This Case,
Should be Modified by the Reasoning Set
Forth in *Furnco*.**

The *Furnco* decision does not make clear how much, if any, of its analysis is applicable to a *Griggs* "disparate impact" case as opposed to the *McDonnell Douglas* "disparate treatment" situation to which the Court was there addressed. *Griggs*, of course was a class action employment test case, as noted by the *Furnco* Court at footnote 7, 46 U.S.L.W. at 4968, while *McDonnell Douglas* was a non-class action employment practice claim.

The argument set forth in Part A, above, is based upon the belief that the employment test nature of *Griggs* is a more significant factor in determining the applicability of that standard than the fact that *Griggs* also involved a class action. Similarly, it is believed that just because *McDonnell Douglas* was not a class action does not preclude application of its reasoning to class action matters. If this Court should conclude, however, that the *Griggs* guidelines must be applied to the present case, it is submitted that that test must be

²³It should be noted that this classification, unlike many others, does not affect persons who have no control over their membership in such class. Despite unfortunate societal pressures which may impact certain people more than others, the classification of addicts, ex-addicts and methadone users is a voluntary class, which by its nature presumes the commission of the felonious criminal act of possession and use of an illegal narcotic drug.

reinterpreted in light of the reasoning and conclusions set forth in *Furnco*.

The *Griggs* test, at least as applied by the lower courts, eliminating actual or even implied intent and applying a rigorous alternative means analysis to the business necessity requirement, 401 U.S. at 431-432, is substantially different from the *McDonnell Douglas* analysis as understood in light of *Furnco*.²⁴ As set forth above, *Furnco* now makes it clear that at least implied, if not actual, discriminatory intent must be shown and that any implication of such intent may be removed if the trier of fact concludes that the challenged employment practice is based upon a valid, non-discriminatory purpose.

There appears to be no valid reason why a plaintiff who alleges representation of a class in addition to personal discrimination should invoke such a different standard as that presently being applied by the courts under the auspices of *Griggs*. If such a disparity is allowed to survive, a class action claim might be successful without proof of intent even though no individual member of the class would be able to prove a right to relief under *Furnco* once individual claims are submitted to the Court. Such a substantive preference for class actions might also burden the courts with cases not otherwise suited for class treatment.

It seems similarly incongruous to apply a different standard to employment tests than is applied to other forms of job requirements or hiring practices. Again, if Title VII requires evidence of intent as outlined in *Furnco*, 46 U.S.L.W. at 4969, it is difficult to imagine what theory would justify the elimination of such a

²⁴See p. 28, *supra*.

fundamental requirement only when employment tests are in question.

The standards set forth in *Furnco*, on the other hand, may be applied equally to the problems which the *Griggs* analysis was meant to remedy — the difficulty of proving actual intent and the discriminatory impact of unexplained employment standards. Under *Furnco*, unlawful intent may be implied unless the employer offers a non-discriminatory explanation satisfactory to the trier of fact. Title VII does not, however, empower a court to “impose a duty to adopt a hiring procedure that maximizes hiring of minority employees.” *Id.* at 4969, in the absence of such implied intent.

Thus, even if the lower court was correct in applying the *Griggs* standard to the present case, *Griggs*, like *McDonnell Douglas*, should be understood and applied in light of *Furnco*.

C. *Griggs* Must be Applied to the Transit Authority's Hiring Practices as a Whole Rather Than to Individual “Subtests”.

Even if this Court determines that *Griggs* provides the appropriate standard for review of this case, and that that standard is not modified by the teaching of *Furnco*, the Transit Authority's policy may yet be upheld. District court and “... of appeals decisions since *Griggs* have been asked to apply the *Griggs* analysis to an infinite variety of circumstances. As in the present case, the employment examination analysis designed for *Griggs* does not always fit well with such variant circumstances. Courts seem to agree, however,

that the *Griggs* standard must be applied to the employer's hiring policies as a whole, and not to individual rules. In other words, an entire testing program and its effects upon hiring should be examined, as opposed to focusing upon individual questions contained in the examination and the disparate impact such a single question or requirement might have. For example, in *Smith v. Troyan*, 520 F.2d at 492 (5th Cir. 1975), the Fifth Circuit determined that use of the Army General Classification Test (AGCT) as one means of judging the qualifications of police force recruits was not a violation of Title VII simply because it had a disparate impact on blacks and women. Rather, the Court stated that the disparate impact must be found in hiring and not in the results of any specific test or requirement. Thus, the Court concluded:

That blacks fare less well than whites on the AGCT, a “subtest” in the process of hiring East Cleveland police officers, is insufficient in itself to require defendants to justify the AGCT as being job-related. Carried to its logical extreme, such a criterion would require the elimination of individual questions marked by poorer performance by a racial group, on the ground that such a question was a “subtest” of the “subtest.”

520 F.2d at 498.

Similarly, the District Court in *Friend v. Leidinger*, 446 F. Supp. 361 (E.D.Va. 1977), refused to find Title VII violations in each individual employment standard or requirement, but rather reasoned that:

The Court is of the opinion that it is the entire selection procedure, not any given segment of it, that must be examined for adverse impact under Title VII. The fact that any stage in a selection procedure has an apparent adverse impact upon

blacks could be nullified by a corrective procedure which would have an apparent adverse impact upon whites, so that the final result would show no racial bias.

447 F. Supp. at 372.

The employment policy now in question before this Court is in actuality no more than a "subtest" of the type addressed in *Smith v. Troyan, supra*, and *Friend v. Leidinger, supra*. Determining whether a job applicant is an addict, ex-addict or methadone user is only one factor in a long list of considerations addressed by the Transit Authority in each employment decision. When the Transit Authority's entire selection and hiring procedure is reviewed, it will be found that the Transit Authority, as acknowledged but not considered relevant by the District Court, 399 F. Supp. at 279, has an exemplary record of minority employment in all levels of responsibility.²⁵

Under such circumstances it is submitted that this Court should conclude, as did the *Smith* and *Friend* courts, that a *prima facie* case has not been established.

D. Title VII, as applied to State and Local Governmental Employers, Requires Proof of Intent to Discriminate, Not Present in This Case.

In 1972 Congress amended Title VII to cover, for the first time, discrimination in employment by states and their political subdivisions. Equal Employment Opportunities Act of 1972, P.L. 92-261, 86 Stat. 103, (amendment to §701(a), 42 U.S.C. §2000e(a)). The

²⁵See pp. 3 and 33, *infra*.

House of Representatives Committee Report relating to this particular provision of the 1972 Amendments clearly indicated that the Fourteenth Amendment to the Constitution was the intended source of Congress' power:

The expansion of Title VII coverage to State and local government employment is firmly embodied in the principles of the Constitution of the United States. The Constitution has recognized that it is inimical to the democratic form of government to allow the existence of discrimination in those bureaucratic systems which most directly affect the daily interactions of this Nation's citizens. The clear intention of the Constitution, embodied in the Thirteenth and Fourteenth Amendments is to prohibit all forms of discrimination.

Legislation to implement this aspect of the Fourteenth Amendment is long overdue, and the committee believes that an appropriate remedy has been fashioned in this bill.

H.R. Rep. No. 92-238, p. 19 (1971); 1972 U.S. Code Cong. & Admin. News 2137, 2154.

Thus, when faced with the necessity of determining the constitutional source of Congress' power to extend Title VII to state and local government in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), this Court concluded that:

There is no dispute that in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised its power under §5 of the Fourteenth Amendment. See, e.g., H.R. Rep. No. 92-238, p. 19 (1971). Cf. *National League of Cities v. Usery*, 426 U.S. 833 (1976).

427 U.S. at 453 note 9.

The *Bitzer* Court's reference to *National League of Cities v. Usery*, 426 U.S. 833 (1976), is also instructive as to the constitutional source of the 1972 amendment. In *National League of Cities* this Court struck down an attempt by Congress to use its Commerce Clause powers to regulate employment decisions of state and local governments. 426 U.S. at 855. The Court reasoned that any federal regulation which operates "to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, . . . are not within the authority granted Congress by [the Commerce Clause]." *Id.* at 852.

It would appear, therefore, that the Fourteenth Amendment is not only the intended constitutional basis for the extension of Title VII to state and local governments, but that the Commerce Clause, upon which the remainder of Title VII is based, could not provide an alternative source of power.

As discussed at length above, the traditional *Griggs* employment test standard of review, if held to be unrefined by *Furnco, supra*, has been generally held not to require proof of intent to discriminate. In fact, the District Court concluded in this matter that evidence of intent was irrelevant based upon its understanding of *Griggs*, 414 F. Supp. at 278.

A different standard, however, requiring proof of intent, has been applied in cases arising under 42 U.S.C. §1983 and the Fourteenth Amendment. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 205 (1973); *Jefferson v. Hackney*, 406 U.S. 535, 548 (1972); *Wright v. Rockefeller*, 376 U.S. 52 (1964); *Akins v. Texas*, 325 U.S. 398, 403-404 (1945). More recently, the Supreme Court, in *Washington v. Davis*, 426 U.S. 229 (1976) has

reaffirmed the Constitutional equal protection intent requirement, in this instance as applied under the Fifth Amendment. As to the contention that such a holding creates a disparity between treatment of a discrimination claim under the Constitution as opposed to Title VII, the *Washington v. Davis* court stated simply that:

"We have never held that the Constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today."

426 U.S. at 239.

The question, then, is how can Title VII be interpreted, as applied to state and local governments, to relieve the claimant of proving intent, when the constitutional basis for that provision, the Fourteenth Amendment, has been repeatedly held to require proof of intent? At least three district courts have concluded that it cannot. *Scott v. City of Anniston, Alabama*, 430 F. Supp. 508 (N.D. Ala. 1977); *Blake v. City of Los Angeles*, 435 F. Supp. 55 (C.D. Cal. 1977); *Friend v. Leidinger*, 446 F. Supp. 361 (E.D. Va. 1977).

The simple conclusion, reached by each of these district courts, is that "a statute can be no broader than its Constitutional base," 430 F. Supp. at 515, and that:

It follows that in Title VII cases against a state or local government the statute is to be construed in accordance with the Constitutional test adopted by the Court in *Washington, supra*, i.e., there must be proof of discriminatory racial purpose.

Id. See also *Friend*, 446 F. Supp. at 386, and *Blake*, 435 F. Supp. at 64.

In view of the District Court's finding in the present case that the Transit Authority did not employ the

challenged classification with any racially discriminatory intent, 414 F. Supp. at 279, the analysis set forth above, if accepted by this Court, would require not only reversal, but entry of judgment in favor of the Petitioner.

CONCLUSION

For the reasons set forth herein, APTA respectfully requests that this Court reverse the judgments of the lower courts and enter judgment in favor of the Petitioner.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1427

NEW YORK CITY TRANSIT AUTHORITY, *et al.*
Petitioners.

v

CARL BEAZER, *et al.*
Respondents

**On Writ of Certiorari to the
United States Court of Appeals for the
Second Circuit**

BRIEF OF THE NATIONAL ASSOCIATION OF STATE
ALCOHOL AND DRUG ABUSE DIRECTORS
AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Is the New York City Transit Authority's policy of total exclusion from employment of all former heroin addicts participating in, or successfully completing, methadone maintenance treatment programs an unconstitutional denial of due process or equal protection under the Fourteenth Amendment?

2. Is the New York City Transit Authority's policy of total exclusion from employment of all former heroin addicts participating in, or successfully completing, methadone maintenance treatment programs an unlawful racial discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*?

INTEREST OF THE NATIONAL ASSOCIATION OF STATE ALCOHOL AND DRUG ABUSE DIRECTORS

The National Association of State Alcohol and Drug Abuse Directors (NASADAD) is a non-profit corporation of the District of Columbia whose membership consists of the State alcoholism and drug abuse prevention authorities of the several States and territories, as designated under Public Laws 91-616 (42 U.S.C. § 4551 *et seq.*) and 92-255 (21 U.S.C. § 1101 *et seq.*), respectively, as amended. The purposes of the corporation are to foster the development of a comprehensive alcohol and drug abuse program capability in each State; to facilitate the evaluation, dissemination, and interstate exchange of alcohol and drug abuse information and program activities among the State program administrators; to assist the Federal and State governments in the design and development and implementation of coordinated, cooperative Federal-State programs; to encourage the Federal government to engage with the States in the comprehensive planning and utilization of government resources at all levels; to identify common interests and differences among the States in the nature of their alcohol and drug problems and to assist in the design of

programs tailored to local characteristics; and to identify problems and issues that require study and research, as well as to conduct evaluation activities upon the request of State alcohol or drug abuse coordinators.

The responsibilities of the corporation's individual members include the planning, development, and support of comprehensive treatment and rehabilitation programs to reduce the effects of drug addiction and abuse. The objectives of such programs, and thus of the State authorities concerned with them, are to aid individuals in ridding themselves of drug addiction and abuse problems and becoming contributing members of society. An important element in habilitating or rehabilitating such individuals is the removal of obstacles to employment in jobs for which those individuals are qualified. Some obstacles are personal to the patient, e.g., poor attitudes, lack of self-confidence, or lack of marketable skills, which the programs deal with directly. Others are institutional, such as exclusionary policies of employers and misunderstandings of the nature of drug addiction and abuse and former drug addicts and abusers, toward which the State authorities as well as the programs direct their attention.

Exclusionary policies are widespread throughout the nation and are followed by some public employers and some private employers in many States. The arbitrary exclusion of former drug addicts or abusers, including persons still in treatment who have ceased illegal use of drugs, has limited the effectiveness of

treatment and rehabilitation efforts, and therefore limited the effectiveness of individual members of NASADAD in carrying out the statutory and administrative mandates of their positions in State government. Affirmance of the decisions below will aid the NASADAD members individually and collectively by expanding employment opportunities for former addicts both directly, by establishing legal precedent binding upon public employers subject to the Fourteenth Amendment, and indirectly, by encouraging private employers to hire qualified former addicts.

The interest of NASADAD in the present case is limited to the public policy impact of the case, and does not extend to the private interests of the parties. Therefore, inasmuch as the Title VII claim was admittedly pressed for the sole purpose of allowance of attorney's fees, this brief *amicus curiae* will discuss only the constitutional question presented.

STATEMENT OF THE CASE

This is a class action commenced under 42 U.S.C. §§ 1981 and 1983, the Fourteenth Amendment, and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) against the New York City Transit Authority (TA), the Manhattan and Bronx Surface Transit Operating Authority (MABSTOA), and certain officials of those governmental instrumentalities. Other initial defendants were excluded by the District Court judgment from liability for the relief granted. The class represented by the four named plaintiffs - respondents

are all former heroin addicts who are participating in or have completed a methadone maintenance treatment program who have been, or would in the future be, subject to dismissal or rejection for employment by the defendants - petitioners.

The suit challenges, as an unconstitutional violation of the due process and equal protection clauses of the Fourteenth Amendment, the policy of the defendants - petitioners to exclude from employment in any position persons who are receiving methadone maintenance treatment or who have successfully concluded such treatment.

The four named plaintiffs include two former employees of the TA, both of whom used heroin at the times they were hired by the TA, who were discharged after the TA learned that they were participants in methadone maintenance treatment programs. The other named plaintiffs were applicants for employment who were rejected by the MABSTOA and the TA because they were former and current methadone maintenance treatment participants, respectively.

The District Court for the Southern District of New York heard fifteen days of testimony and received other evidence in an exhaustive effort to examine the factual issues presented. Expert witnesses gave evidence of the effects of methadone used for treatment of heroin addiction, described in detail the operations and experiences of the major methadone maintenance programs in New York City, and presented data on employment and employability of methadone

maintenance patients; major employers who had experience with methadone maintained employees also testified regarding the work performance of those employees.

The District Court entered an opinion on August 6, 1975 (399 F. Supp. 1032) containing extensive findings of fact and holding that the Transit Authority's blanket exclusion of present and former methadone maintenance patients violated the due process and equal protection clauses of the Fourteenth Amendment, thus entitling the plaintiffs - respondents to relief under that Amendment and under 42 U.S.C. § 1983. The defendants - petitioners were directed to consider each methadone maintained employee or applicant for employment according to his individual merits and the position held or sought.

The TA was directed to reexamine the employability of the named plaintiffs - respondents and report back to the Court for determination of reinstatement and back pay rights. Subsequently the Court ordered two of the named plaintiffs - respondents employed with back pay, but denied relief to two named plaintiffs - respondents and one applying member of the class. The Court found it unnecessary to reach the issue of the alleged violation of Title VII of the Civil Rights Act of 1964 in view of its holding on the issue of constitutionality.

In a Supplemental Opinion entered May 5, 1976, the Court held that the defendants - petitioners were guilty of discrimination in violation of Title VII, upon a

renewed application of the plaintiffs - respondents. The sole purpose of the application was to obtain the benefit of the Title VII provision authorizing the award of a reasonable attorney's fee to the prevailing party. The final order of the District Court permanently enjoined the defendants - petitioners from enforcing the blanket exclusionary policy and awarded attorney's fees to the plaintiffs - respondents.

On appeal, the United States Court of Appeals for the Second Circuit entered an opinion on June 22, 1977 (558 F.2d 97) affirming the judgment of the District Court, except reversing as to the denial of relief to the three plaintiffs - respondents and reducing the amount of the award of attorney's fees.

On June 28, 1978, the Supreme Court of the United States granted the defendants - petitioners' Petition for a Writ of Certiorari, limiting the Court's review to the two issues heretofore stated as Questions Presented.

SUMMARY OF ARGUMENT

The blanket exclusionary policy of the defendants - petitioners barring employment in any position of former heroin addicts who are participating in, or have successfully completed, a methadone maintenance treatment program has no rational relationship to the legitimate interests of the defendants - petitioners. Applying established constitutional doctrines, the trial court correctly held the blanket exclusion to be in violation of the due process and equal protection clauses of the Fourteenth Amendment.

Studies of many methadone maintained patients over long periods have shown them to be indistinguishable from similar persons in the general population who have not used narcotic drugs. Consideration of such persons on an individual basis, matching their qualifications with the requirements of specific occupations or positions, would reveal many to be employable.

The policy of the Federal government since at least 1972, when major efforts to increase treatment and rehabilitation of drug addicts and abusers began, has been to increase employment opportunities for former addicts. This policy, expressed by both the legislative and executive branches, increases the effectiveness of treatment and rehabilitation efforts to return the former addict to productivity and social acceptability.

ARGUMENT

- I. The Courts below correctly applied the "rational relationship" test in determining that the Transit Authority's blanket exclusionary policy toward methadone maintained employees violates the Fourteenth Amendment.

In its opinion, the District Court succinctly stated the constitutional doctrine applicable to the present case, "A public entity such as the Transit Authority cannot bar persons from employment on the basis of criteria which have *no rational relation* to the demands of the jobs to be performed. To do so is a violation of both the due process and equal protection clauses of the

Fourteenth Amendment. This applies to new applicants for employment, and to existing employees threatened with termination." 399 F. Supp. at 1057. (Emphasis added.) Applying these principles to factual findings amply supported in the record, the trial court said, "It is perfectly clear that there are substantial numbers of present or past methadone maintained persons who would be capable of performing many of the jobs at the TA. Individual consideration, or narrower rules rationally related to certain classifications of jobs, are constitutionally required. The *lack of a reasonable basis* for the present policy of the TA is particularly evident from the markedly different treatment given to problem drinkers—persons presenting greater risks than those members of the plaintiff class for whom employment is sought." 399 F. Supp. at 1058. (Emphasis added.)

In *Sugarman v. Dougall*, 413 U.S. 634 (1973), the Court held that a similar blanket policy banning aliens from a class of public employment was a violation of the equal protection clause. While carefully pointing out that "on the basis of an individual determination" an alien may be denied public employment if the refusal to hire, or the discharge is based on "legitimate state interests that relate to the qualifications for a particular position or to the characteristics of the employee." 413 U.S. at 647. Only the "flat ban . . . in positions that have little, if any relation to a State's legitimate interest," was unconstitutional. 413 U.S. at 647. Even where a specific occupation is the subject of legitimate State interest, the Fourteenth Amendment requires that "any qualification must have a rational connection with the applicant's fitness or capacity" for the activity. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 at 239 (1957).

The due process clause of the Fourteenth Amendment also requires that blanket policies or rules based on conclusive presumptions of physical inadequacy be held unconstitutional. In *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), the Court considered rules requiring all pregnant teachers to take extended leaves of absence beginning in the fourth or fifth month of pregnancy, and held, at page 651, that "...the mandatory termination provisions of the...maternity regulations violate the Due Process Clause of the Fourteenth Amendment, because of their use of unwarranted conclusive presumptions that seriously burden the exercise of protected constitutional liberty."

As found by the trial court (399 F. Supp. at 1049), the Transit Authority has no blanket prohibition against employment of persons with criminal records, persons taking drugs such as tranquilizers, persons formerly confined to mental institutions, persons being treated by a psychiatrist, or persons with medical problems such as diabetes, epilepsy, or heart disease. In each of these conditions individual consideration is given to the applicant or employee. Only in the case of former heroin addicts, particularly those participating, or who have completed participation, in methadone maintenance treatment programs does the TA deem it necessary to exclude all such persons.

The Transit Authority seeks to justify the relationship between its policy and a legitimate concern for public safety by three major assertions: (1) a methadone maintenance patient embodies the underlying character defects which caused him to turn

to heroin in the first place, so there is a substantial risk that such person will revert to heroin or turn to other drugs or alcohol abuse; (2) there are significant adverse physiological effects from methadone which would impair the performance of a methadone maintenance patient as an employee; and (3) there is no satisfactory way of screening the reliable methadone patient from the unreliable, so a blanket exclusionary policy is administratively necessary. 399 F. Supp. at 1036. The trial court found that these assertions were contrary to the overwhelming weight of the evidence presented and summarized its factual findings,

"...the crucial point made so strongly by plaintiffs' witnesses was never convincingly challenged—that methadone as administered in the maintenance programs can successfully erase the physical effects of heroin addiction and permit a former heroin addict to function normally both mentally and physically... It is further clear that the employable can be identified by a prospective employer by essentially the same type of procedures used to identify other persons who would make good and reliable employees." 399 F. Supp. at 1037.

The defendants - petitioners now seek to apply the standard of equal protection adopted by the Court in *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61 (1911), emphasizing, "A classification having some reasonable basis does not offend against (the equal protection) clause merely because it is not made with

mathematical nicety or because in practice it results in some inequality." But even if this standard is used, this case does not present a question of "mathematical nicety," but rather an assumption that all present or former methadone maintenance patients are alike, and that their characteristics differ significantly from persons with mental illness, diabetes, epilepsy, heart disease, or alcoholism. Such an assumption is unsupported and unsupportable.

II. Former heroin addicts, including those participating in methadone maintenance programs are employable in a variety of occupations.

Studies of work performance, psychomotor ability, intelligence, skill retention, and attitudes have concluded that former heroin addicts, including persons being maintained on stable doses of methadone, have characteristics similar to persons of similar background in the population at large. Indeed, a substantial number of drug addicts or abusers are employed while using illicit drugs. Reports to the National Institute on Drug Abuse, Department of Health, Education and Welfare, of 24,500 heroin users admitted to Federally assisted treatment programs in January to March, 1978 show that 27% were employed at the time of admission. Division of Scientific and Program Information, *NIDA Statistical Series, Quarterly Report, Provisional Data, January-March 1978*, Series D, No. 6; Rockville, Md., 1978.

Leading studies by Dr. Norman B. Gordon have demonstrated psychomotor performance, intellectual functioning, and reaction time of methadone maintenance program participants to be equivalent to that of the general population. Gordon, Warner, and Henderson, *Psychomotor and Intellectual Performance Under Methadone Maintenance* Reported to the Committee on Drug Dependence, National Academy of Sciences, National Research Council, 1967. Gordon and Appel, "Performance Effectiveness in Relation to Methadone Maintenance" in *Proceedings, Fourth National Conference on Methadone Treatment*; New York, N.Y., 1972. Driving ability of methadone maintenance patients showed no significant deficiency in a study initiated by the National Highway Traffic Safety Administration. Dunlap and Associates, Inc., *Drug Abuse and Driving Performance, Final Report*; National Highway Traffic Safety Administration, Washington, D.C., 1972.

Testimony in the present case by physicians with extensive experience in methadone programs was summarized in the opinion of the trial court. Dr. Paul Cushman, Jr., Director of the Methadone Maintenance Clinic of St. Luke's Hospital, testified that methadone maintenance patients are basically indistinguishable from comparable non-drug users. Dr. Joyce Lowinson, Director of the Methadone Maintenance Program at Bronx State Hospital, testified that patients stabilized on methadone function normally and cannot be distinguished from persons not taking methadone, except by urine or blood tests. 399 F. Supp. at 1043-44.

To contend that all former heroin addicts, or all methadone maintained former addicts, are employable would be as wrong as the contention of the Transit Authority that none are employable. The point is that former heroin addicts, with or without methadone, differ from each other just as persons in the general population, or persons with other illnesses or disabilities, do. Some have skills, some do not; some are reliable, some are not; some are more intelligent than others; some are employable, some are not. A blanket policy of exclusion, such as that of the Transit Authority, fails to take this individuality into account and arbitrarily places all such persons in a single class, contrary to fact.

III. Federal policy has consistently stressed the importance of employment opportunity to fulfilling the goals of treatment and rehabilitation of drug addicts and abusers.

The rapid growth of narcotic addiction and drug abuse and the attendant social ills of increased anti-social behavior and decreased productive self-support in the late 1960s and into the 1970s prompted responses by both the legislative and executive branches of the Federal government. The major step toward Federal action to reduce the demand for illicit drugs was the enactment of the Drug Abuse Office and Treatment Act of 1972, P.L. 92-255 (86 Stat. 65 *et seq.*). The Congress, in Section 102 declared the national policy and purpose of the Act to be "to focus the comprehensive resources of the Federal Government and bring them to bear on drug abuse... and to

develop a comprehensive, coordinated long-term Federal strategy to combat drug abuse."

As part of this comprehensive effort, Section 413 of the Act provided,

"(a) The Civil Service Commission shall be responsible for developing and maintaining, in cooperation with the Director and with other Federal agencies and departments, appropriate prevention, treatment, and rehabilitation programs and services for drug abuse among Federal civilian employees. Such policies and services shall make optimal use of existing governmental facilities, services, and skills.

(b) The Director shall foster similar drug abuse prevention, treatment, and rehabilitation programs and services in State and local governments and in private industry.

(c)(1) No person may be denied or deprived of Federal civilian employment or a Federal professional or other license or right solely on the ground of prior drug abuse."

An exception for certain security-sensitive agencies and other sensitive positions was included in the section; it was also made clear that employees unable to function properly could be dismissed. Urging adoption by the Senate of the Conference Committee Report including this provision, Senator Harold Hughes pointed out that it treated drug dependent persons the same as other persons with serious health problems. *Congressional Record*, March 17, 1972, page S 4154.

Subsequent to enactment of P.L. 92-255, expressions of policy direction have been made at least annually. In 1973, the Second Report of the National Commission on Marihuana and Drug Abuse concluded, "The Commission recommends that industry consider alternatives to termination of employment for employees involved with drugs. Where the nature of the business allows, employees should be referred to company-run or other public and private rehabilitation or counseling programs... The Commission recommends that the business community not reject an applicant solely on the basis of prior drug use or dependence, unless the nature of the business compels doing so." National Commission on Marihuana and Drug Abuse, *Drug Use in America: Problem in Perspective*, 386-87; Washington, D.C., 1973; G.P.O. No. 5266-00003.

Other policy pronouncements include the following:

"Alternatives to drug use are important not only in the context of prevention; meaningful alternatives to a drug using life style are also important when the ex-drug abuser is attempting to adopt a useful role in society. Of particular importance is the availability of worthwhile employment. However, there are barriers to ex-drug abusers obtaining jobs... Without the cooperation of private employers, no solution to drug abuse problems is possible. The goal is not to convince employers to give ex-drug abusers priority over others, but merely to give them equal consideration unclouded by fixed beliefs so that they can move back into the

mainstream of society." Strategy Council on Drug Abuse, *Federal Strategy for Drug Abuse and Drug Traffic Prevention 1973*, 67-68; Washington, D.C., 1973; G.P.O. No. 5203-00001.

"If Federal, State, and local drug abuse treatment services are to be more than temporary holding operations, they must assure that their clients can have access to a range of rehabilitation alternatives, including basic education opportunities, vocational counseling, skills training and job placement." Strategy Council on Drug Abuse, *Federal Strategy for Drug Abuse and Drug Traffic Prevention 1974*, 26; Washington, D.C., 1974; G.P.O. No. 4110-00014.

"Vocational rehabilitation is a critical part of the treatment process, since society's objective of altering the drug-using lifestyle of a former addict is clearly linked to his ability to find and hold a job. A job not only enables one to be self-supporting, it enhances the dignity and self-reliance that people need to be responsible members of society." Domestic Council Drug Abuse Task Force, *White Paper on Drug Abuse*, 77; Washington, D.C., 1975; G.P.O. No. 041-010-00027-4.

"Because employment and related training and job development activities are essential to the rehabilitation of the drug involved offender, and current services lacking, we must establish ways of improving drug offenders' employability and employment opportunities. Over the next six months, the cabinet Committee on Drug Abuse Prevention, Treatment and

Rehabilitation will undertake to ensure that drug abusers will not be denied access to existing Federal manpower or rehabilitation programs. Specific activities will be directed at reviewing guidelines, regulations and plans for vocational rehabilitation and employment programs at both Federal and State levels; developing cooperative activities and projects in these areas; and developing a strategy for greater involvement of the private sector in employment programs." Strategy Council on Drug Abuse, *Federal Strategy for Drug Abuse and Drug Traffic Prevention* 1976 44-45; Washington, D.C., 1976; G.P.O. No. 052-003-00251-5.

"To improve the quality of Federal drug treatment, I am recommending these steps:

- To help drug abusers return to productive lives, I am directing the Secretary of Labor to identify all Federal employment assistance programs which can help former drug abusers and to give me, within 120 days, his recommendations for increasing the access of drug abusers to them." President Jimmy Carter, Special Message to the Congress, August 2, 1977, *Office of Drug Abuse Policy, 1978 Annual Report*, 84; Washington, D.C., 1978.

In addition to these statements, the Federal government has incorporated in treatment program requirements recognition of the importance of

employment as an objective of treatment and rehabilitation. Of particular relevance the regulations adopted by the Food and Drug Administration and the National Institute on Drug Abuse establishing Program Standards for Methadone Maintenance and Detoxification, 21 C.F.R. Part 291, include, *inter alia*,

"§ 291.505 (6) (v) Vocational rehabilitation, education, and employment. (a) Each program shall provide opportunities directly, or through referral to community resources, for those patients who either desire or who have been deemed by the program staff ready to participate in educational job-training programs or to obtain gainful employment as soon as possible. Each program shall maintain a list of references that may be used for referral purposes if rehabilitative activities are not provided directly. The references shall include the opportunities for vocational training, education, and employment as well as the community resources that may be available to provide assistance for such activities."

It is not suggested by this public policy or in this brief that there is any duty of employers to assist in the rehabilitation of former heroin addicts. The Federal and State governments and treatment programs have undertaken that responsibility. All that is sought is removal of artificial barriers to employment of qualified persons so that the goals of treatment and rehabilitation may be realized.

CONCLUSION

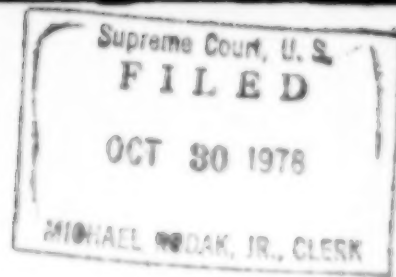
For the foregoing reasons this Court should affirm the judgment of the District Court, as modified and affirmed by the Court of Appeals, holding that the blanket exclusionary employment policy of the defendants - petitioners violates the due process and equal protection clauses of the Fourteenth Amendment.

Respectfully submitted,

ROBERT B. STITES,
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as Amicus Curiae.

October 6, 1978

IN THE
SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1978
No. 77-1427



NEW YORK CITY TRANSIT AUTHORITY, ET AL.,
Petitioners,
v.

CARL BEAZAR, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

BRIEF FOR THE AMICUS CURIAE
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INTEREST OF AMICUS CURIAE

The Western Law Center for the Handicapped is a public interest law firm providing legal services to individuals and groups with legal problems related to their disability, and to organizations of disabled persons which advocate enforcement of the human rights of persons with disabilities.

A person with a history of drug abuse and who is a methadone program participant is a handicapped person within the meaning of the Rehabilitation Act of 1973, as amended, 29 U.S.C. Sec. 706(6). Like those whose disability is a history of drug abuse, many persons with other disabilities are subject to government classification on the basis of their disability. Like those whose disability is a history of drug abuse, many persons with other

disabilities are subject to classifications based on myths, stereotypes and misconceptions about the disability. Until January of this year, a person in a wheelchair was barred from sitting on a jury in California. Chapter 301 (1978), amending Sec. 198 and 602 of the Calif. Code of Civ. Proc. Until recently a number of states prohibited an epileptic from marrying; as recently as 1976 five states listed epilepsy as a reason for involuntary sterilization. Legal Rights of Persons with Epilepsy, p. 6, 10, Epilepsy Foundation of America (1976).

The decision in this case will define the minimal constitutional protections available to persons whose disability is past heroin addiction with respect to arbitrary and irrational governmental classifications based on that disability. Such definition will

also be relevant to persons with other sorts of handicapping disabilities.

SUMMARY OF ARGUMENT

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Sec. 794, imposes an obligation on most public employers not to discriminate on the basis of handicap and further to accommodate to the handicapped person's limitations unless to do so would cause undue hardship. The obligations imposed are substantially broader than those imposed by the Fourteenth Amendment. Since this case went to trial it has been established that members of the plaintiff class are handicapped persons and protected by the Act from employment discrimination, and further that there is a

private right of action to enforce the Sec. 504 nondiscrimination obligations. Therefore the precedential value of the decisions below is necessarily limited and this Court should reconsider its grant of certiorari on the constitutional issue.

Assuming this Court does not reconsider its grant of certiorari, this Court should affirm the holdings of the courts below that "the blanket exclusionary policy against persons on methadone maintenance is not rationally related to the safety needs, or any other needs, of the [Transit Authority]" and therefore violates the Fourteenth Amendment's Due Process and Equal Protection Clauses. Beazer v. N.Y.C. Transit Authority, 399 F. Supp. 1032, 1036 (S.D.N.Y. 1975). In reaching its conclusion that the classification was irrational, the District Court used

the traditional rational basis test to examine the largely uncontroverted evidence overwhelmingly supporting plaintiffs' position. Because of the overwhelming evidence showing the irrationality of the classification at issue, the District Court did not reach the question of whether, because methadone program participants share characteristics in common with traditionally suspect classifications, the trial court should have examined the classifications with greater scrutiny than that required by the traditional rational basis test. However, any question concerning the rigorousness of the test used in determining the rationality of the classification at issue should be resolved in favor of respondents because of the presence of suspect classification indicia. Finally, the classifications at issue are so sweeping and

irrational that they violate the Due Process Clause

ARGUMENT

I. THIS COURT SHOULD RECONSIDER ITS GRANT OF CERTIORARI ON THE CONSTITUTIONAL QUESTION IN VIEW OF THE REHABILITATION ACT OF 1973.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Sec. 794, forbids virtually all public employers from maintaining employment policies which categorically exclude past drug users. The act provides that "[n]o otherwise qualified handicapped individual... shall, solely by reason of his handicap... be subjected to discrimination under any program or activity receiving federal financial assistance." An opinion of the United

states attorney general, dated April 12, 1977, and based on an extensive analysis of legislative history, concluded that drug addicts are "handicapped individuals" protected by the antidiscrimination provisions of 504. See Regulations, Department of Health, Education and Welfare, 42 Federal Register 22676, 22686 (May 4, 1977). Amendments to the Act passed by Congress on October 15, 1978, and, presently awaiting the President's signature, eliminate any possible doubt whether Congress intended to include drug users within the definition of handicapped persons. ^{1/} A narrow exception was drawn to exclude "active" drug addicts from those protected against employment (including the discrimination. Appendix.

1/ Conferences Report on H.R. 12467

The Rehabilitation Act, as implemented by regulations,^{2/} imposes on employers far greater obligations necessity of making reasonable accommodation to the needs of handicapped persons unless such accommodation would involve undue hardship to the employer) than those resulting from the limited constitutional protection under the 14th Amendment. At the time of trial, plaintiffs' private right of action in a class case under 29 U.S.C. Sec. 794 was uncertain.

But subsequent cases-Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978), Drennon v. Philadelphia General Hospital, 428 F. Supp. 809 (E. D. Pa.

^{2/} 42 F.R. 22676 (5/4/77); 43 F.R. 2132 (1/13/78).

1977), Lloyd v. Regional Transit Authority, 548 F. 2d 1277 (7th Cir. 1977), as well as the pending 1978 amendments to the Rehabilitation Act, have clarified that a private right of action for attacking systemic discrimination exists following resort to available administrative processes. Thus it is unlikely that lower courts will be required to reach the Constitutional questions here posed because of the broader reach of the statutory protections. Therefore, the petition for Certiorari should be dismissed as improvidently granted.

II. THIS COURT SHOULD AFFIRM THE HOLDING THAT THE TRANSIT AUTHORITY'S POLICY OF EXCLUDING METHADONE PROGRAM PARTICIPANTS FROM CONSIDERATION FOR EMPLOYMENT VIOLATES THE DUE PROCESS AND EQUAL

PROTECTION CLAUSES OF THE
FOURTEENTH AMENDMENT.

The Transit Authority barred all methadone program participants from consideration for any of its approximately 47,000 jobs. The District Court applied the traditional rational basis test when it concluded, after exhaustive inquiry, that

"the blanket exclusionary policy against persons on methadone maintenance is not rationally related to the safety needs, or any other needs, of the TA.

"I have concluded that the policy is the result of a misunderstanding by the TA regarding the nature and effect of methadone maintenance." Beazer v. N.Y.C. Transit Authority, 399 F.Supp 1032, 1036, (S.D. N.Y. 1975)

That the District Court used the traditional rational basis test was underscored by the Second Circuit when it found the \$50,710 "premium" attorney fees awarded to be an abuse of

discretion because the legal issues were relatively simple and there was no dispute over the governing constitutional standards. Beazer v. N.Y.C. Transit Authority, 558 F.2d 97, 100 (2d Cir. 1977.)

A. The Transit Authority's policy was properly held to be irrational.

Whether a governmental classification meets the requirements of the Equal Protection Clause depends on whether the classification rationally furthers the purpose identified by the State. Mass. Board of Retirement v. Murgia, 427 U.S. 307, 317 (1976). The District Court below, in attempting to apply the standard in this case, became concerned after six days of trial about the Transit Authority's failure to produce evidence showing justification

for defendants' blanket exclusion. In order to determine whether a rational basis for the policy could be found in evidence theretofor not advanced by the Transit Authority, the court requested the parties to suggest additional witnesses and eventually heard nine more days of testimony.

"But the crucial point made so strongly by plaintiffs' witnesses was never convincingly challenged - that methadone as administered in the maintenance programs can successfully erase the physical effects of heroin and permit a former heroin addict to function normally both mentally and physically. Beazer v. N.Y.C. Transit Authority, supra at 1037.

The court also found "that a person maintained on a constant dose of methadone can perform normally by every standard that relates to employability, and that, except in rare cases, there are no side effects making such a person incapable of being employed." supra at 1045.

The court further found that determinations on the employability of particular methadone program

participants could be made on the same basis that determinations were made with respect to any other applicant or employee. supra at 1048-51.

The court below did indicate, however, that the Transit Authority could impose reasonable rules about the jobs for which it would consider methadone maintained persons and about what methadone maintained persons it would consider - i.e., conditioning consideration on successful performance in a methadone program for a period of time such as a year; excluding such safety sensitive jobs as subway motorman, subway conductor, subway towerman, bus driver, and jobs dealing with high voltage equipment. Supra, at 1058.

The District Court thus in effect held that the Transit District was not foreclosed from making classifications

which satisfied the traditional rational basis test in that they were rationally related to its legitimate needs. Other courts have invalidated overly broad classifications under traditional rational basis test. In Davis v. Weir, 497 F.2d 139 (5th Cir. 1974), the court found that a practice rejecting water service applications until all accrued debts at the premises were extinguished was overly broad in that it included within its ambit innocent tenants in addition to owners and landlords who were the defaulting debtors. In Slochower v. Board of Education, 350 U.S. 551, 558 (1956), the court found a statute to be overly broad because it permitted plaintiff's discharge to be based on events entirely outside the scope of the city's legitimate interest.

1. The District Court's holding was consistent with this Court's reasoning and holding in Murgia

Petitioners' reliance on Mass. Board of Retirement v. Murgia, 427 U.S. 307 (1976), to support their position is misplaced. Petitioners have not confronted the basic differences in the two cases. In the case at bar, plaintiffs proved that the policy adopted by the transit Authority was irrational in that it was based on assumptions inapplicable to the class as a group, and presented exhaustive - and largely uncontroverted evidence in support of their assertions. By way of contrast, Murgia did not contest the rationality of the classification itself in the absence of individual tests, but rather challenged the lack of an opportunity to show that the

generalization that may have been applicable to the group to which he belonged - persons over the age of 50 - were not applicable to him. supra, at 310-311 and n.10. Nowhere did he contend, let alone prove, as did the plaintiffs in the case at bar, that the members of his group who were excluded from employment could perform the duties of the job as well as the members of those groups who were not excluded from employment. Where a classification itself is found not to be a violation of the Equal Protection Clause, a violation will not be found merely because such classification works hardships in individual cases, See Califano v. Jobst, ____ U.S. ____, 95 S.Ct. 95, 99 (1978). The instant case is further distinguishable from Murgia. In Murgia the court, citing Dandridge v. Williams, 397 U.S. 471, 475 (1970), noted

"the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary." Supra, at 314.

At note 7, at p.314, the Murgia court outlined the complex of problems and factors that were involved in the legislature's line-drawing process in fixing and reviewing the mandatory retirement age for uniformed police officers. The Transit Authority is a

"'body corporate and politic constituting a public benefit corporation' (N.Y. Publ. Auth. Law Sec. 1201), autonomous in its operations. The members of the Authority are appointed by the Governor, but once appointed they serve for a fixed term of eight years. Id. Sec. 1262.b and 1263.1. The Authority can ... promulgate its own rules for both its internal management and the use of transit facilities under its jurisdiction Id., Sec. 1204.4, 1204.5-a." (Respondent's brief in opposition to certiorari, p. 12)

The classification at issue was not the result of a legislative line drawing

but rather the procrustean application of an agency rule excluding persons who use narcotics to persons in a methadone maintenance program. Courts have not always accorded deference to an unbuttressed agency classification. In Hampton v. Wong, 426 U. S. 88 (1976), this Court noted that "[a]rguably .. [the Civil Service Commission's] administrative convenience may provide a rational basis for a general rule' excluding all noncitizens [from federal civil service] when it is manifest that citizenship is an appropriate and legitimate requirement for some important and sensitive positions." The Court found no justification for such a blanket exclusion where there was no indication the Commission had compared the relative desirability of a simple exclusionary rule with the value of enlarging the pool of eligible

employees, and no indication of the administrative burden of establishing the job classifications for which citizenship is an appropriate requirement. Id., 115. However, upon remand to the District Court and following an intervening Executive Order limiting federal civil service to citizens, the court determined that the rule substantially furthered important federal interests. Id. on remand, 435 F.Supp. 37 (N.D. Calif. 1977)

B. Although the Transit Authority policy at issue was properly invalidated under the Equal Protection Clause as being totally irrational, the presence of indicia associated with suspect classifications would have justified closer scrutiny.

The District Court, in finding the petitioner's policy of excluding all methadone maintained persons from employment totally lacking in rationality, did not reach the question of whether a more rigorous standard of scrutiny would apply. However, some of the indicia associated with "suspect classes" are present in the case at bar, and to the extent they are present may justify closer scrutiny of the disability classification at issue in this factual context of this case.

Therefore any question concerning the test used should be resolved in favor of respondents.

The indicia associated with a suspect class was originally set forth in U.S. v. Carolene Products, 304 U.S. 144, 153 n.4 (1938), and explained in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973). A suspect class cannot be large, diverse or amorphous, but is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Additional insights as to the indicia of a suspect class appear in Frontiero v. Richardson, 411 U.S. 677, 685-686 (1973), where the plurality opinion notes the common acceptance of

stereotypes regarding women's natural role, the high visibility of the characteristic, the immutability of the characteristic and the fact that it frequently bears no relation to ability to perform or contribute to society.^{3/} Most recently in Board of Regents v. Bakke, _____ U.S.____, 98 S.Ct. 2333, 2748-49 (1978), Mr. Justice Powell wrote,

"Nor has this court held that discreteness and insularity constitute necessary preconditions to a holding a particular classification is invidious. [footnotes omitted] See, e.g. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Carrington v. Rash, 380 U.S. 89, 94-97 (1965). These characteristics may be relevant in deciding whether or not to

3/ The Frontiero plurality opinion also suggests the pervasiveness of stereotyped or paternalistic conceptions that a handicapped person's ability to perform or contribute to society is limited necessarily: "...what differentiates sex from such nonsuspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." Supra at 686.

add new types of classifications to the list of 'suspect' categories or whether a particular classification survives close examination. See, e.g. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 3, 313 (1976) (age); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (wealth); Graham v. Richardson, 403 U.S. 365, 372 (1971)"

Former addicts, including those maintained on methadone, have been subjected to a lengthy history of purposefully unequal treatment, particularly in the field of employment.

4/

4/ See, e.g., Interim Report of the Temporary State Commission to Evaluate the Drug Laws, "Employing the Rehabilitated Addict", (New York State Legislative Document No. 10, at 27 (1973) (Plaintiffs' trial exhibit 18) ("widespread irrational discrimination on an unyielding and categorical basis"); Brecher, Licit and Illicit Drugs 148 (1972) ("Systematic

The stereotyped conceptions about former heroin addicts, including those on a methadone maintenance program, and their immutable moral unfitness, are reflected in the District Court's report of trial testimony of petitioners' medical director, the only medical expert called by petitioners at trial

"...[When a man goes on heroin there is 'some deficiency somewhere' which presumably persists thereafter, particularly while the person needs the 'crutch' of methadone maintenance.]"

The court noted

"the presumption that heroin addiction invariably stems from some character defect, making a person more or less permanently unemployable, cannot be supported. Beazer v. N.Y.C. Transit Authority, supra, 399 F. Supp. at 1049.

The mere status of being a heroin addict, apart from the purchase or use of the drug, was punishable as a crime

(footnote 4 continued)
Discrimination against [former addicts]").

in many jurisdictions until this Court voided such laws in Robinson v. California, 370 U.S. 660 (1962). But assumptions concerning the inherent criminality are not limited to statutes. The Transit Authority's chief executive testified before trial that in a retail chain where he formerly worked there was "a high incidence of theft" ... "traceable in large measure to persons with histories of past or present drug usage." (Beazer v. New York City Transit Authority, Brief for Defendant-Appellants, filed in the Second Circuit 2/28/77. p.7) Assuming arguendo that such testimony is correct, the exclusion of all persons maintained on methadone from all public employment cannot rationally be predicated on the criminality of some drug addicts. As the District Court noted, the Transit Authority can use its

regular processes to screen out individuals who are otherwise undesirable.

Amicus does not here contend that class of methadone maintained persons should be treated as sharing the indicia of a suspect class in all legislative classifications. The idea that classification can be suspect in some circumstances but not in others was explicitly recognized by this Court in Foley v. Connelie, ____ U.S. ____, 98 S.Ct. 1067 (1978), where it was held that alienage, previously accorded the status of a suspect class in circumstances involving welfare (Graham v. Richardson, 403 U.S. 365 (1971)), education (Nyquist v. Mauclet, 432 U.S. 1 (1977) and general public employment (Sugarman v. Dougall, 413 U. S. 634 (1973)), is not entitled to such treatment in the area of employment in law

enforcement. Quoting In re Griffiths, 413 U.S. 717 (1973), which involved admission of aliens to the bar, the Court found justified the earlier application of strict scrutiny because the exclusions "struck at the non-citizen's ability to exist in the community, a position seemingly inconsistent with the Congressional Determination to admit the alien to permanent residence." Foley, supra at 1070.

Such a rationale is particularly applicable to the case at bar where the exclusion from a broad range of public employment likewise strikes at the ability of the rehabilitated drug addict to exist in the community, which is inconsistent with the Congressional determination that persons with a history of drug addiction are handicapped persons in need of

compelling that only a rational basis
for the classification need be shown.^{5/}

^{5/} Any argument that might be made concerning the similarity between law enforcement positions and those of Transit Authority conductors and motormen on the issue of public safety is specifically foreclosed by the District Court's exemption of such "safety sensitive" position from its order. Beazer, supra, at 1058.

C. The Transit Authority's
Exclusionary Policy is so irrational
and sweeping that it violates the
Due Process Clause

At issue here is a policy which, like the sweeping exclusion of aliens from federal civil service condemned by this Court in Sugarman v. Dougall, 413 U.S. 634 (1973), excludes class members from consideration for any of the Transit Authority's 47,000 jobs. This Court has invalidated classifications which restricted the ability to earn a livelihood - Schware v. Bd. of Bar Examiners, 353 U.S. 742 (1957), Bell v. Burson, 402 U.S. 635 (1971) - and in Hampton v. Wong, 426 U.S. 88, 102-103 (1976), characterized access to public employment as a "liberty interest".

This Court has held that where the breadth of the classification cannot be

justified in terms of the legitimate articulated state interest, and where there is no procedure for rebutting the presumption created by the classification, then such classification violates the Due Process Clause. The standards were articulated in two cases which Petitioner concedes involved irrational classifications (Brief for Petitioners, p. 38): U.S. Dept. of Agriculture v. Murry, 413 U.S. 508 (1972) and Vlandis v. Kline, 412 U.S. 441 (1972). In Murry this court examined the government's articulated bases for excluding certain households from food stamps and concluded,

"Tax dependency in a prior year seems to have no relation to the need of the dependent in the following year ... We have difficulty in concluding that it is rational to assume that a child is not indigent this year because the parent declared the child as a dependent in his tax return for the prior year... We conclude that the deduction taken for the benefit of the parent in the prior year is not a rational measure of the

need of a different household with which the child of the tax-deducting parent lives and rests on an irrebuttable presumption often contrary to fact." (Emphasis added) supra at 513, 514.

Again in Vlandis v. Kline, 412 U.S. 441 (1972), this court examined the relationship of a statute which decreed that certain university students remain nonresidents during their entire course of study to the state interest articulated to determine whether those interests were furthered by such statute:

"The state offers three reasons to justify that permanent irrebuttable presumption. ...

"In sum, since Connecticut purports to be concerned with residency in allocating the rates for tuition and fees in its university system, it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidency, when that presumption is not necessarily or universally true in fact, and when the state has reasonable alternative means of making the crucial determination." supra, at 448, 452.

And in Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 644-646 (1973) the Court found violative of the Due Process Clause provisions calling for mandatory termination from teaching at the 5th and 6th month of pregnancy where, while some women would physically unable to work past the cut-off date, large numbers of women would be physically capable of continuing, and where there were alternative means for determining physical fitness. However, the court, at footnote 13, indicated that where the school district could show a rational basis for a classification, it would not be required to provide individualized determinations. ^{6/}

^{6/} See also Cleveland Bd. of Educ. v. La Fleur, *supra*, 414 U.S. at 653. "Whether the challenged aspects of the regulation constitute sex classifications or disability classifications, they must at least rationally serve some legitimate articulated or obvious state interest."

Petitioners in their brief (Petitioners brief, p.38.) rely on Weinberger v. Salfi, 422 U.S. 749, 785 (1975) when they conclude that they are not required to make individualized determinations when they "can rationally conclude" not only that generalized rules are appropriate to its purposes and concerns, but also that the difficulties of individual determinations outweigh the marginal increments in the precise effectuation of [governmental] concern which they might be expected to produce." Leaving aside the issue of the rationality of petitioners' conclusions, the standards set forth in Salfi were explicitly directed to social welfare cases and as such are not automatically transferrable

footnote 6 continued

While there are indeed some legitimate state interest at stake here, it has not been shown that they are rationally furthered by the challenged portions of these regulations. (J. Powell, concurring, footnote 2, emphasis added)

to nonwelfare related cases.

"A statutory classification in the area of social welfare is consistent with the Equal Protection Clause of the Fourteenth Amendment if it is rationally based and free from invidious discrimination." Dandridge v. Williams, 397 U.S. 471, 487....

"These cases quite plainly lay down the governing principle for disposing of constitutional challenges to classifications in this type of social welfare legislation..." supra at 770.

Challenges to government statutes or regulations establishing or denying eligibility for various types of welfare deal with the claimants' entitlement to public funds. The actuarial soundness argument, which was crucial to this court's decision in Geduldig v. Aiello, 417 U.S. 484 (1974), provides an alternative basis for the Court's decision in Weinberger v. Salfi which is not applicable to a case involving categorical exclusion from a broad range of public employment. See Weinberger v.

Salfi, supra at 775-776. The District Court in Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978), which is the only case known to amicus beside the one at bar to have considered the constitutionality of a categorical exclusion of persons with a history of drug usage from a broad range of public employment that and which reached the same result as the District Court herein, noted that

"...the Supreme Court in Weinberger v. Salfi, 442 U.S. 749, 955 S.Ct. 2457, 45 L. Ed 2d 522 (1975) narrowed the possible application of the irrebuttable presumption doctrine on the basis of the type of 'right' affected by the presumption in that case. However, I agree with the District Court in Gurmankin v. Costanzo, 411 F. Supp. 982 (E.D.Pa. 1976) aff'd 556 F.2d 184 (3rd Cir. 1977), that the La Fleur analysis is appropriate where, as here, an objectively defined group is denied public employment. See also Duran v. City of Tampa, 430 F. Supp. 75, 78 (M.D. Fla. 1977)" supra at 800-801 n.8

Recent decisions by this Court resolve any doubt as to the Court's

continued reliance on the irrebuttable presumption doctrine following Salfi, supra. Turner v. Dept of Employment Security, 423 U.S. 44 (1975); Califano v. Goldfarb, 430 U.S. 199, (1977).

CONCLUSION

The Court should dismiss the Petition for Certiorari on the constitutional questions, or, in the alternative, should affirm the judgments below on the constitutional questions presented.

Dated: Los Angeles,
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Respectfully submitted,

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APPENDIX

(Excerpt from Conference Report on HR 12467 amending 29 U.S.C. Sec. 706(6) which bill was passed by Congress on October 15, 1978, and is currently before the President for signature.

"Subject to the second sentence of this paragraph, the term handicapped individual means, for purposes of Titles 4 and 5 of the Act, any person who

(1) has a mental or physical impairment which substantially limits one or more of such person's major life activities,

(2) has record of such impairment, or

(3) is regarded as having such an impairment.

"For purposes of Sections 503 and 504 as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose impairment, by reason of such current alcohol or drug use, would constitute a direct threat to property or the safety of others."